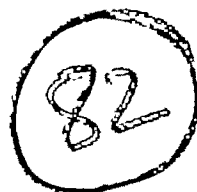


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Vol. 82.

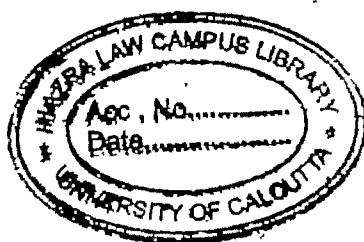
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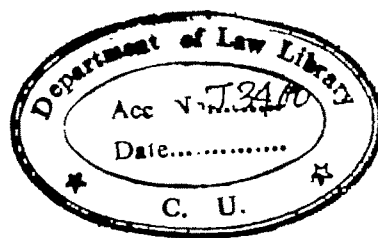
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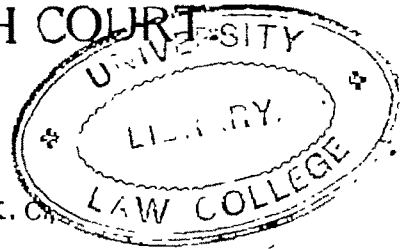
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1947-1948.

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Chief Justice.

The Hon'ble Sir Arthur Trevor Harries, M. C., K. C.



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CALCUTTA.

No. 1.

FEDERAL COURT.

PRESENT: *Sir Patrick Spens, Knight, Chief Justice,*
Mr. Justice Zafarulla Khan and Mr. Justice
H. J. Kania.

MAHARAJADHIRAJ UDAY CHAND MAHTAB
OF BURDWAN

v.

MINOR SAMARENDRA NATH MITRA
AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT FORT WILLIAM IN BENGAL.]

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CIVIL
1947.
January, 4.

Ultra vires—Bengal Tenancy Act (VIII of 1885), section 168A—Sale of putni tenure under Regulation VIII of 1819—Decree for rent for preceding year under Bengal Tenancy Act—Decree, if money decree—Other properties of the judgment-debtor not liable.

Section 168A of the Bengal Tenancy Act is *intra vires* the Province of Bengal as it is covered by Entry No. 21, List II as also by Entries Nos. 21 and 2 of List II of Schedule VII of the Constitution Act. It is a valid piece of legislation and forms part of the Bengal Tenancy Act. Thus the Civil Procedure Code can apply only subject to the provisions of the Bengal Tenancy Act and that includes section 168A.

Section 168A of the Bengal Tenancy Act is not in conflict with Entry No. 4 of List III of Schedule VII of the Constitution Act.

Section 168A of the Bengal Tenancy Act is applicable even though the decree be not considered as passed under the Bengal Tenancy Act.

The respondents held a *putni* as tenants under the appellant. The lands under the *putni* were agricultural lands. The rents due in respect of this *putni* were in arrears for many years and on the 15th May, 1936, the *putni* was put up to sale under the provisions of Regulation VIII of 1819 for recovery of the rent due for the last *kist* of 1342 B. S. (1935-36), and was purchased by a stranger. For recovery of the rent due in respect of the years 1339-41 B. S. (1932-35) and the first *kist* of 1342 B. S. (1935-36) the landlord instituted a suit and obtained a decree on 25th February, 1938. The decree-holder applied

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for recovery of the decretal money by attachment and sale of certain immovable properties belonging to the judgment-debtors other than what was given as a *putni* to the debtors.

Held, that the appellant was not entitled to proceed against any other properties of the judgment-debtors under section 168A of the Bengal Tenancy Act.

That the decree passed in the present case was a decree for rent. The proviso to section 17 of Regulation VIII of 1819 did not make the arrears of rent a money claim.

The procedure to cause the property let to the tenants to be sold for the immediately preceding year's rent only, is a special procedure provided by Regulation VIII of 1819 and a landlord can take advantage of it without going to Court at all.

That the provisions of the Bengal Tenancy Act applied even after the relation of landlord and tenant had ceased to exist.

Forbes v. Maharaj Bahadur Singh (1) distinguished.

Federal Court Civil Appeals Nos. V and VI of 1945 by the Landlord.

Dr. N. C. Sen Gupta, senior Advocate, Federal Court, (*Mr. Samarendra Nath Mukherji*, Advocate, Federal Court, and *Mr. Purushottam Chatterjee*, Advocate, Calcutta High Court with him) instructed by *Mr. Ranjit Singh Narula*, Agent for the Appellant (in both the Appeals).

Mr. B. Banerji, Advocate, Federal Court, (*Mr. Hemendra Chandra Sen*, Advocate, Calcutta High Court with him) instructed by *Mr. P. K. Bose*, Agent for the Respondents Nos. 4 and 5 (in both the Appeals).

Mr. Rama Prosad Mukherji, senior Advocate, Federal Court, (*Mr. Nirmal Kumar Sen*, Advocate, Federal Court, with him) instructed by *Mr. P. K. Bose*, Agent for the Intervener (in both the Appeals).

Respondents Nos. 1, 2, 3, 6 and 7 have not entered appearance.

The judgment of the Court was delivered by

January, 4.

Kania, J. :—These two appeals are from a judgment of a Division Bench of the High Court at Calcutta and raise the question of the validity of section 168A of the Bengal Tenancy Act as amended by the Act of 1940.

The relevant facts are these. The appellant in both the appeals is a big zamindar. The respondents held a *putni* as tenants under the appellant. The rents due in respect of this *putni* were in

arrears for many years and on the 15th May, 1936, the *putni* was put up to sale under the provisions of Regulation VIII of 1819 for recovery of the rent due for the last *kist* of 1342 B. S. (1935-36) and it was purchased by a stranger. For recovery of the rent due in respect of the years 1339-41 B. S. (1932-35) and the first *kist* of 1342 B. S. (1935-36), the landlord instituted a suit being Rent Suit No. 2 of 1937 in the Court of the Subordinate Judge at Hooghly and obtained a decree for Rs. 56,000 and odd on the 25th February, 1938. Attempts were made to execute the decree between 1938 and 1940 and some amounts were recovered from the judgment-debtor. The appellant then started execution proceedings on the 25th September, 1940, in the Court of the Second Subordinate Judge of 24-Parganas, as the decree was transmitted there for execution. The decree holder applied for recovery of the balance by attachment and sale of certain immovable properties belonging to the judgment-debtors, other than what was given as a *putni* to the debtors, and certain immovable properties were attached. Objections were taken to this by judgment-debtors 4 and 5 in one case and the Official Receiver in the other, and they gave rise to Miscellaneous Cases Nos. 24 and 40 of 1941. The appeals are from the decision of the High Court in these two cases.

The contention of both sets of judgment-debtors in substance was that the appellant was not entitled to proceed against any other movable or immovable properties of the judgment-debtors because of section 168A of the Bengal Tenancy Act. The Subordinate Judge, before whom the case first came for disposal, upheld the objections and dismissed the application for execution. An appeal preferred to the High Court also failed but the Court granted a certificate under section 205 of the Government of India Act, 1935, and the appellant has thereupon brought this appeal to this Court.

On behalf of the appellant, it was contended that section 168A was *ultra vires* the Province of Bengal, because it was not covered by Entry No. 21 or No. 21 read with Entry No. 2 of List II of Schedule VII of the Constitution Act. In the alternative it was argued that it came in conflict with Entry No. 4 of List III of the same Schedule. The second line of argument was that the decree was not for arrears of rent; it was a money decree and the provisions of the Bengal Tenancy Act did not apply to the enforcement of the decree at all. It was argued that therefore section 168A of the Bengal Tenancy Act had no application to the facts here. These points were urged before the lower Courts, but without success.

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It is common ground that the lands given under the *pattai* tenure were agricultural lands. Entry No. 21 in List II of Schedule VII runs as follows :—

"Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant and the collection of rents, transfer, alienation and devolution of agricultural land, land improvement and agricultural loans, colonization, Court of Wards; encumbered and attached estates; treasure trove".

Entry No. 2 in the same List runs as follows :—

"Jurisdiction and powers of all Courts except the Federal Court with respect to any of the matters in this List; procedure in Rent and Revenue Courts".

Section 168A of the Bengal Tenancy Act runs as follows :—

"(1) Notwithstanding anything contained elsewhere in this Act, or in any other law, or in any contract—

(a) a decree for arrears of rent due in respect of a tenure or holding, whether having the effect of a rent decree or money decree, or a certificate for such arrears signed under the Bengal Public Demands Recovery Act, 1913, shall not be executed by the attachment and sale of any movable or immovable property other than the entire tenure or holding to which the decree or certificate relates :

Provided that the provisions of this clause shall not apply if, in any manner other than by surrender of the tenure or holding, the term of the tenancy expires before an application is made for the execution of such a decree or certificate ;

(b) the purchaser at a sale referred to in clause (a) shall be liable to pay to the decree-holder or certificate-holder the deficiency, if any, between the purchase price and the amount due under the decree or certificate together with the costs incurred in bringing the tenure or holding to sale and any rent which may have become payable to the decree-holder between the date of the institution of the suit and the date of the confirmation of the sale.

(c) In any proceeding pending on the date of the commencement of the Bengal Tenancy (Amendment) Act, 1940, in execution of a decree or certificate to which the provisions of sub-section (1) apply, if there has been attached any immovable property of the judgment-debtor other than the entire tenure or holding to which the decree or certificate relates, and if the property so attached has not been sold, the Court or Certificate-officer as the case may be shall, on the application of the judgment debtor, direct that, on payment by the judgment-debtor of the costs of the attachment, the property so attached shall be released".

The rest of the section is not material.

The first question for consideration, is whether section 168A of the Bengal Tenancy Act is covered by Entry No. 21 or No. 21 read with Entry No. 2 of List II. That List covers matters on which the Provincial Legislature has exclusive powers to make laws. It was contended on behalf of the appellant that under Regulation VIII of 1819, the landlord had a right to recover the amount due as a personal debt. Under that Regulation, power is given to the landlord to get the tenure sold only for the rent of the previous year without filing a suit for the purpose. Section 17 of that Regulation provides for the disposal of the proceeds of any sale made under the Rules of that Regulation. A certain percentage from the net sale proceeds had first to be deducted on account of the Provincial Government. The zamindar was next to be paid the rent of the preceding year with interest and charges incurred in bringing the taluq to sale. Then follows a proviso which runs as follows :—

“ Provided, however, that no former balances beyond those of the current year (or of that immediately expired, if the sale be at the commencement of the following year) shall be included in the demand to be thus satisfied. Such antecedent balances, if the zamindar shall have omitted to avail himself of the process within his reach for having them satisfied at the time, will have become in fact mere personal debts of the individual taluqdar and must be recovered in the same way as other debts by a regular suit in the Court ”.

It was further provided that the balance should be sent to the treasury of the Collector to meet the other claims pending against the taluqdar. Relying on the words of the proviso, it was argued on behalf of the appellant that the decree passed for arrears of rent in the present case was not a decree for rent but for a money claim. It was, therefore, contended that it was not passed under the Bengal Tenancy Act. —

In our opinion, the first contention that the Provincial Legislature had no power to enact section 168A is unsound. The words of Entry No. 21 clearly cover legislation in respect of rights in or over land and include the relation of landlord and tenant and the collection of rents. The meaning of section 168A is very clear. It appears to have been enacted to prevent a landlord from depriving a tenant of his other movable or immovable property to satisfy the claim for rent of the property let to the tenant. Sub-clause 1(a) therefore directs that a decree for arrears of rent which has the effect of a rent decree or a money decree shall not be executed by

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the attachment and sale of any movable or immovable property other than the entire tenure or holding to which the decree relates. Sub-clause (1) (b) recognises that there may be a deficit and the decree may not be fully satisfied by the sale proceeds. It, therefore, provides that the purchaser shall make good that deficit. Sub-section 2 (which, in fact, applies to the present case) expressly directs that in any proceeding pending on the date of the commencement of the Amending Act, in execution of a decree to which sub-section 1 applied, if any immovable property was attached the same should be released on the application of the judgment-debtor on his paying the costs of the attachment. It is, therefore, clearly a piece of legislation in respect of the right of landlord and tenant with regard to rent which had accrued due in respect of the property let to the tenant. In our opinion, therefore, the words of Entry No. 21 clearly cover this section.

If it were argued that this is a procedural section in respect of attachment of property and therefore is not covered by Entry No. 21 in List II, Entry No. 2 is relevant. It provides for legislation in respect of the jurisdiction and powers of all Courts (except the Federal Court) with respect to any of the matters in List II. The collection of rents is covered by Entry No. 21. The jurisdiction and powers of the Courts in respect of the collection of rents is therefore covered by Entry No. 2 in the List. Section 168A of the Bengal Tenancy Act clearly deals with the powers and jurisdiction of the Court to get money paid to a decree-holder in respect of his decree for arrears of rents of agricultural lands. We, therefore, agree with the learned Judges of the High Court at Calcutta that section 168A is covered by Entries Nos. 21 and 2 of List II of Schedule VII of the Constitution Act.

The next contention that the impugned section is in conflict with Entry No. 4 of List III of the same Schedule has also no substance. The contention was that under section 51 of the Civil Procedure Code a decree-holder had the right to have his decree executed as provided therein. Section 168A, it was argued, was in conflict with section 51 of the Civil Procedure Code and therefore the Provincial Legislature had no right to enact the same, as section 51 of the Civil Procedure Code was already on the Statute Book when section 168A of the Bengal Tenancy Act was enacted. The answer to this is found in section 143(2) of the Bengal Tenancy Act. That section runs as follows :—

“143 (1) The High Court may from time to time, with the approval of the Provincial Government, make rules consistent

with this Act, declaring that any portions of the Code of Civil Procedure shall not apply to suits between landlord and tenant as such, or to any specified classes of such suits, or shall apply to them subject to modifications specified in the rules.

(2) Subject to any rules so made and subject also to the other provisions of this Act, the Code of Civil Procedure, 1908, shall apply to all such suits''.

Sub-section (2) expressly makes the application of the Civil Procedure Code subject to the other provisions of the Bengal Tenancy Act. If the Provincial Legislature had power to enact section 168A under Entries Nos. 21 and 2 of List II, it is a valid piece of legislation and will form part of the Bengal Tenancy Act. That being so, the Civil Procedure Code can apply only subject to the provisions of the Bengal Tenancy Act and that would include section 168A. It may also be noted that the Civil Procedure Code is made applicable to decrees passed under the Bengal Tenancy Act only because of section 143 of that Act. If the same Act (which makes provision for its application) at another place provides that it shall not apply to a certain extent, it cannot be successfully contended that the last provision is in conflict with Entry No. 4 of List III of Schedule VII of the Constitution Act and is therefore *ultra vires*. In our opinion, therefore, this contention must fail.

The last contention was that this decree is outside the Bengal Tenancy Act and therefore section 168A of the Act cannot apply to it at all. It is necessary to look at the record to ascertain if this decree was passed under the Bengal Tenancy Act. It is admittedly a claim in respect of arrears of rent of land given on *patti* tenure. It is registered as Rent Suit No. 2 of 1937 between landlord and tenant for the recovery of rent as contemplated by section 146 of the Act. The suit is for rent of three and a half years only. That can be done under Schedule III, Article 2(b) of the Bengal Tenancy Act. If this was a money claim, apart from the Bengal Tenancy Act, the landlord could have filed a suit to recover arrears of six years' rent on the registered lease. That has not been done. Apart from the contention urged by Counsel before us, it does not appear to have been raised in the lower Courts and the record does not show any reason why we should accept this contention. Apart from that, the wording of section 168A covers the case. It is made applicable when the decree is for arrears of rent, whether having the effect of a rent decree or money decree. The opening words of

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the section further show that effect must be given to the section notwithstanding anything contained elsewhere in the Bengal Tenancy Act, or in any other law, or in any contract. If the Legislature has power to pass the Act, none of these phrases oversteps the legislative limits of the Provincial Legislature. Therefore, the section would be applicable even though the decree may not be considered as passed under the Bengal Tenancy Act. We do not think that the contention of the appellant that the decree in the present case is not a decree for rent has any substance. Moreover, under section 168A if a decree for arrears of rent is passed, whether it has the effect of a rent decree or a money decree, the consequences mentioned in the section have to follow. The appellant, therefore, is in no better position in either case. In our opinion, the proviso to section 17 of Regulation VIII of 1819 does not make the arrears of rent a money claim. The proviso only states that the balance of the sale proceeds shall not be utilised in paying the arrears of rent, but those arrears must be recovered by the landlord as personal debts by an ordinary civil suit. The procedure to cause the property let to the tenant to be sold for the immediately preceding year's rent only, is a special procedure provided by Regulation VIII of 1819 and a landlord can take advantage of it without going to a Court at all.

It was strenuously urged on behalf of the appellant that no provision of the Bengal Tenancy Act can apply after the relation of landlord and tenant had ceased to exist. It was pointed out that before the present suit was filed, the land was sold under Regulation VIII of 1819. Therefore, no relationship of landlord and tenant existed between the parties when the present suit to recover arrears of rent was filed. In support of this contention, Counsel relied on *Arthur Henry Forbes v. Bahadur Singh and others* (1). In that case, the Judicial Committee of the Privy Council had occasion to consider section 65 of the Bengal Tenancy Act which is in the following terms :—

"Where a tenant is a permanent tenure-holder a raiyat holding at fixed rates or an occupancy-raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon".

The Board held that the right of sale and the charge given

(1) (1913-14) L. R. 41 I. A. 91; 1 L. R. 41 Calo. 926; 25 C. L. J. 434.

by the section existed only in favour of a person who occupied the position of a landlord and so long as the relationship of landlord and tenant continued. In our opinion, that case does not help the appellant. The decision was on the construction of section 65 of the Bengal Tenancy Act. The words used in the section are clearly applicable only when the relationship of landlord and tenant existed on the date of the suit. There can arise no occasion for an ejectment, or a claim to a first charge on a property liable to be sold in execution of a decree for the rent, unless on the date of the suit the parties were a landlord and tenant. In the course of that judgment, certain observations showing that the Bengal Tenancy Act would operate or would govern the rights of the parties when they were landlord and tenant, are found, but those observations, as has been repeatedly pointed out, must be read along with the facts of the case. A careful reading of the judgment shows that the Judicial Committee of the Privy Council were dealing only with the effect and interpretation of section 65. We do not think that that case supports the wide proposition urged on behalf of the appellant.

The result is that the appeals fail and are dismissed with costs.

A. T. M.

Appeals dismissed.

CIVIL RULE.

Before Mr. Justice R. F. Lodge.

SAILA BALA DASI (GHOSH)

v.

ATUL KRISHNA MONDAL AND OTHERS.*

Auction sale—Setting aside of—Presumption—Notice sent by registered post—Endorsement, 'refused'—Denial—Limitation Act (IX of 1908), section 18—Fraud of decree-holder.

Where notices are sent by registered post and returned with the endorsement 'refused,' the Courts are entitled to presume that they were tendered: *Hari Pada Dutta v. Jey Gopal Mukherjee* (1).

*Civil Rule No. 1921 of 1944, against the order of the Subordinate Judge, 4th Court, Allpore (24-Parganas) dated the 4th July, 1944, reversing the order of Munsiff, 2nd Court, Baruipore, dated the 21st February 1944.

(1) (1931) 39 C. W. N. 934.

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(Ghosh)Atul Krishna
Mondal.

But where a person to whom the notices were stated to have been tendered denies that they were tendered to him and the Judge held that the denial in the circumstances of the case was sufficient to rebut the presumption :

Held, that the Judge was perfectly within his right so to hold.

In order to succeed in an application under section 174(3) of the Bengal Tenancy Act, to set aside an execution sale, if the application is made outside the period of limitation prescribed by law, the applicant must show that the auction-purchaser was himself guilty of the fraud which kept the applicant from the knowledge of his right to make the application or was accessory to it. Fraud on the part of the decree-holder alone will not extend the period of limitation under section 18 of the Limitation Act.

Application for Revision under section 115 of the Code of Civil Procedure by the Auction-purchaser.

Application to set aside an execution sale under section 174(3), Bengal Tenancy Act, by the Judgment-debtor.

The material facts appear from the judgment.

Mr. Parash Nath Mookerjee (Jr.) for the Petitioner.

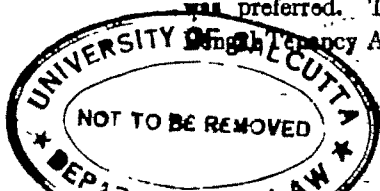
Messrs. Abinash Chandra Ghose and *Hemanta Kumar Bose* (for *Mr. Ramendra Mohan Majumdar*, for the Deputy Registrar) for the Opposite Party.

The judgment of the Court was delivered by

June, 4.

Lodge, J. :—This Rule was issued to show cause why an order passed under section 174(3) of the Bengal Tenancy Act should not be set aside.

The material facts are as follows : The landlord instituted a suit for assessment of rent and for recovery of rent and obtained a decree. In execution of that decree the holding was put to sale on May 21, 1942. The sale was confirmed in the ordinary way on June 1942. On July 3, 1942 the auction purchaser took out the sale certificate and, according to the record, obtained delivery of possession through Court on March 2, 1943. On June 12, 1943 one of the tenant judgment debtors filed two applications before the Court. One was an application under Order 9, rule 13 and the other was an application under section 174(3) of the Bengal Tenancy Act. In these applications he asserted that he had been kept out of knowledge both of the decree and the sale and he had come to know of both of them on June 3, 1943. The application under Order 9, rule 13 was dismissed on November 30, 1943 and no appeal against the order of dismissal was preferred. The application under section 174(3) of the Bengal Tenancy Act was dismissed by the court of first instance



on February 21, 1944. The learned Munsif found that processes had not been suppressed, that the property had not been sold at an inadequate price, that the auction purchaser was benāmdār of one of the judgment-debtors and that the application was barred by limitation.

The applicant appealed to the Subordinate Judge. His application was allowed, the Subordinate Judge finding that processes were suppressed and that there was fraud on the part of the decree-holder. The learned Judge accordingly set aside the sale on certain conditions. The auction purchaser has moved this Court.

On behalf of the auction purchaser it has been argued first, that the learned Judge was wrong in his decision that processes had been suppressed and secondly, that the learned Judge had considered the question of limitation.

With regard to the first of these points the evidence of service of processes was evidence that the concise statement was sent by registered post. Some of them were served by the judgment-debtors and seven were returned with the endorsement 'refused'. It has been argued that there is a presumption from this endorsement, that the notices were tendered to the judgment-debtors and that until that presumption is rebutted the court ought to hold that there had been proper service. It was argued further that in the present case there was no evidence to rebut the presumption and that therefore the learned Judge was wrong in his finding and acted irregularly in the exercise of his jurisdiction in coming to this wrong finding. Reliance was placed on the case of *Hari Pada, Dutta v. Joy Gopal Mukherjee* (1). The facts of the case relied on were very exceptional and entirely different from the present case. There can be no doubt, however, in view of that ruling that where notices are sent by registered post and returned with the endorsement 'refused' the courts are entitled to presume that they were tendered. In this particular case the person to whom they were stated to have been tendered denies that they were tendered to him. The learned Subordinate Judge held that the denial in the circumstances of the present case was sufficient to rebut the presumption and I am not prepared to hold that he was not right in doing so or that he was not competent to consider the circumstances and this refusal is sufficient to rebut that presumption. In this view I am not competent to question the finding that processes were in fact suppressed.

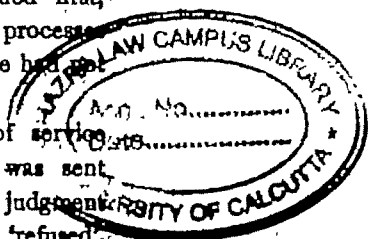
(1) (1931) 39 C. W. N. 934.

CIVIL

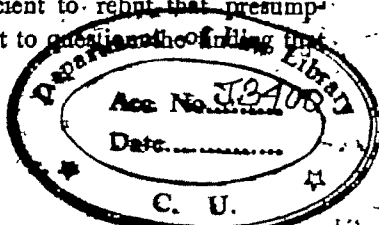
1946

Salla Bala Dasi
(Ghosh)Atul Krishna
Mondal.

Lodge, J.



LP1889



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1946.

Salla Bala Das
(Ghosh)v.
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Mondal.

Lodge, 7.

This leads us to the question whether the learned Subordinate Judge did or did not consider the question of limitation and whether in considering the question of limitation, if he did so, he acted with material irregularity in the exercise of his jurisdiction. As stated above the sale took place on May 21, 1942. The application under section 174(3) of the Bengal Tenancy Act was made on June 12, 1943, more than a year after the date of sale. Therefore prima facie it was barred by limitation. The learned Munsif held that in fact it was barred by limitation. It has been argued before me by the petitioner that the learned Subordinate Judge did not consider the question of limitation, but he confined himself to considering whether fraud had been committed by the decree-holder and having held that there was a fraud by the decree-holder, set aside the sale without considering the question of limitation. I am not satisfied that that is what the learned Subordinate Judge has done. In my opinion the learned Subordinate Judge has in fact considered the question of limitation, though his discussion of the matter is not free from obscurity. It has been argued however that even if he has considered the question of limitation, he has not applied the law on the subject correctly and my attention was drawn to section 18 of the Limitation Act. For the petitioner it was argued that fraud on the part of the decree-holder would not serve to extend the period of limitation under section 18 of the Limitation Act in an application to set aside a sale, unless it were shown that the auction purchaser was the person guilty of the fraud or was accessory thereto. I agree entirely with this point of view. I am satisfied that in order to succeed in an application under section 174(3) of the Bengal Tenancy Act, if the application is made outside the period of limitation prescribed by law, the applicant must show that the auction purchaser was himself guilty of the fraud which kept the applicant from the knowledge of his right to make this application or was accessory thereto.

The question is whether the learned Subordinate Judge has approached the question of limitation from this point of view. It is true that in his judgment the learned Subordinate Judge contented himself with saying "in this view of the matter I find that a fraud was committed by the decree-holder in bringing about the sale of the lands and that sale cannot stand". This does suggest that the learned Subordinate Judge considered that it was sufficient to show that the decree-holder had been guilty of fraud. But the whole of the discussion in the judgment is a

discussion of the conduct of the judgment debtor on whose behalf the auction purchaser made the purchase. The learned Judge considered the circumstance that some of the postal notices were received and some were returned 'refused' and the learned Judge came to the conclusion that it was probable that some judgment-debtor had informed the postal peon that the other judgment-debtor refused to receive and acknowledge the notices. The learned Subordinate Judge then went on to point out that one of the judgment-debtors took an active part against the applicant who sought to set aside the sale. He again pointed out that the same judgment-debtor had gone to great lengths to secure the property either for himself or for his sister. It seems to me that the learned Judge was of opinion that the judgment-debtor in question, Nakul, was himself a party to the fraud committed by the decree-holder and was therefore in the words of section 18 "accessory to the fraud". The auction purchaser is, in the view of both the courts below, merely a benamdar of the judgment-debtor, Nakul.

It seems to me that the findings of the Subordinate Judge really indicate that the Subordinate Judge was of opinion that the auction-purchaser was accessory to the fraud. If this is the right interpretation of the judgment of the learned Subordinate Judge, the applicant under section 174 of the Bengal Tenancy Act was entitled to an extension of the time by virtue of section 18 of the Limitation Act. In these circumstances it does not seem to me that this is a fit case in which I should interfere.

The Rule is accordingly discharged with costs—hearing-fee one gold mohur.

A. T. M.

Rule discharged.

Civil.

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Salla Bala Dasi
(Ghosh)

v.
Atul Krishna
Mondal.

Lodge, J.

Before Mr. Justice R. F. Lodge.

SHEIKH LOKEMAN ALI

v.

ABDUL MOTALED AND ANOTHER.*

Civil
1945.
b.c.
March, 15-25.
1945

Transfer—Subsequent transferee, if bound—Occupancy holding—Transfer by co-sharer tenant—Subsequent transfer by transferee—Subsequent transfer before application for pre-emption—Bengal Tenancy Act (VIII of 1885), section 26F—Subsequent transferee, proper party in application—Identity of person pre-empting.

As soon as a transfer of a share in a holding is effected a right to pre-empt immediately accrues to the co-sharer tenants, and any subsequent transferee of the property takes it subject to that right. This rule applies whether the subsequent transfer is made before or after the application under section 26F of the Bengal Tenancy Act is made: *Civil Revision Case No. 788 of 1945* followed.

The fact that the subsequent transferee did not know the identity of the person who had the right to pre-empt makes no difference to the rights of the parties.

In an application under section 26F of the Bengal Tenancy Act by the co-sharer tenant for pre-emption the transferee from the purchaser is a proper party.

Application for Revision under section 115 of the Code of Civil Procedure by the Applicant under section 26F of the Bengal Tenancy Act.

Application for pre-emption under section 26F of the Bengal Tenancy Act.

The material facts appear from the judgment.

Messrs. Surajit Chandra Lahiri and Samarendra Nath Banerjee for the Petitioner.

Messrs. Girija Prasanna Sanyal and Hemanta Kumar for the Opposite Party.

C. A. V.

*Civil Revision Case No. 1780 of 1945, against the decision of A. S. Ray Esq., District Judge of Birbhum (Suri) dated the 28th May, 1945, affirming those of J. N. Maltra Esq., Sadar Munsif of Suri (Birbhum), dated the 3rd and 9th November, 1944.

The judgment of the Court was delivered by

Lodge, J. :—This Rule was issued to show cause why an order passed under section 26F of the Bengal Tenancy Act should not be set aside or modified.

The material facts are not in dispute. The petitioner Sheikh Lokman Ali was one of a number of co-sharers in possession of a rayati holding recorded in khatian No. 11C of Mouza Kaspai in the district of Birbhum having acquired his interest by purchase by a kobala, dated February 12, 1944 but registered on June 5, 1944. C. S. plot No. 409 is one of the plots comprised in that rayati holding. Other lands of the holding were transferred by other co-sharers to opposite-party No. 1 Abdul Motaleb by a registered kobala dated February 19, 1944. Abdul Motaleb again transferred these lands to opposite party No. 2 Samsuzzoha.

Petitioner Sheikh Lokman Ali made an application under section 26F(1) within four months of the transfer to Abdul Motaleb but after the transfer by Abdul Motaleb to Samsuzzoha and deposited the amount of the consideration money for which Abdul Motaleb purchased, together with compensation. He made both Abdul Motaleb and Samsuzzoha parties to the application. A preliminary objection was taken by Samsuzzoha that he was not a necessary party and this objection was allowed. Samsuzzoha's name was struck off; Sheikh Lokman Ali's application was allowed as against Abdul Motaleb only, and the latter was allowed to withdraw the money in deposit 'subject to equities that may be available against him'.

Sheikh Lokman Ali appealed; this appeal was dismissed with costs.

It seems to me clear that the petitioner Sheikh Lokman Ali being a co-sharer tenant of the occupancy rayati holding both at the time of the transfer to Abdul Motaleb and at the time of the transfer by Abdul Motaleb to Samsuzzoha, and the transfers to Abdul Motaleb and to Samsuzzoha not being within the exceptions mentioned in section 26F(1) of the Bengal Tenancy Act, the petitioner Sheikh Lokman Ali is entitled to invoke the provisions of section 26F and apply to the court for the portion transferred to Abdul Motaleb and to Samsuzzoha to be transferred to himself. Sheikh Lokman Ali was co-sharer of Abdul Motaleb's vendors at the time of the transfer to Abdul Motaleb; and he could certainly invoke the provisions of the section against Abdul Motaleb at least up to the time when Abdul Motaleb transferred his interest to Samsuzzoha. Sheikh Lokman Ali, if he did not or

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Sheikh Lokman Ali

v.
Abdul Motaleb.

March 25.

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Sheikh Lokman Ali
v.
Abdul Motaleb.
Lodge, F.

could not exercise his right against Abdul Motaleb, became a co-sharer with the latter and at the time of the transfer to Samsuzzoha could if he desired have exercised the right granted by the section as against Samsuzzoha alone. The question is whether when Sheikh Lokman sought to exercise his rights under the section in respect of the transfer to Abdul Motaleb, other transferees from Abdul Motaleb would be bound. In other words, did Samsuzzoha purchase the share of Abdul Motaleb subject to the exercise of a right of pre-emption by the co-sharers of Abdul Motaleb's vendors?

The courts below seem to hold that he did not.

There is no reported case exactly on all fours with this case. But there is a decision of Edgley, J. in Civil Revision Case No. 788 of 1945 which deals with the case of a subsequent transfer by the first transferee, the distinction between that case and the present being that the subsequent transfer was made after the application was made under section 26F in that case, but before that application in the present case.

Edgley, J. observed 'As soon as a transfer of a share in a holding is effected a right to pre-empt immediately accrues to the co-sharer tenants, and any subsequent transferee of the property must take it subject to that right.

It was suggested in argument before me that Edgley, J.'s decision was based on an extension of the doctrine of *lis pendens*, and was applicable only to cases where the subsequent transfer was made after an application under section 26F had been filed. I am unable to agree with this view. The decision of Edgley, J. seems to me based on the obvious fact that any other interpretation of the section would enable a transferee to defeat the object of the Legislature. This argument applies with equal force whether the subsequent transfer is made before or after the application under section 26F is made.

A prior transferor might transfer to a relative for a greatly enhanced consideration immediately after his own transfer and thus defeat the object of the Legislature; or he might make a gift of the right so acquired, to his own son and thus defeat the object of the section—unless the view adopted by Edgley, J. be accepted.

The provisions of section 26F(a) also seem to indicate that it was the intention of the Legislature to prevent a transferee dealing with the property to the prejudice of a possible pre-emptor.

I am therefore of opinion that the decision of Edgley, J. is equally applicable to the facts of the present case; and I respectfully agree with that decision.

It follows that Samsuzzoha bought the property from Abdul Motalib subject to the right to Sheik Lokmanali to pre-empt; and that when Sheik Lokman exercised his right within the time prescribed by law, he was entitled to recover the property from Samsuzzoha. It also follows that Samsuzzoha was a proper party to the proceedings.

There was a suggestion that inasmuch as the transfer to Samsuzzoha was made before Samsuzzoha knew of Sheik Lokmanali's interest, Samsuzzoha could not have bought subject to a right on the part of Sheik Lokmanali to pre-empt. I can see no force in this argument. Samsuzzoha knew that he was purchasing a share in an occupancy rayati holding; he knew that his vendor had a co-sharer or co-sharers; he knew that his vendor had acquired his interest by transfer shortly before the transfer to Samsuzzoha. He must have known therefore that some person had a right to pre-empt when his vendor obtained the property by transfer. The fact that he did not know the identity of the person who had the right to pre-empt makes no difference, in my opinion, to the rights of the parties.

The Rule is therefore made absolute. The order of the Munsiff striking off the name of Samsuzzoha is set aside and it is ordered that the petitioner do get the lands mentioned in the schedule by way of pre-emption and that opposite party Samsuzzoha be bound by this order. Petitioner will recover costs of all Courts from opposite parties 1 and 2.

Hearing fee one gold mohur.

A. T. M.

Rule made absolute.

Civil.

1916.

Sheikh Lokman Ali

Abdul Motalib.

Kodje, J.

APPELLATE CIVIL.

*Before Mr. Justice R. C. Miller, and Mr. Justice
A. S. M. Akram.*

CIVIL.

1946.

March, 28, 29.
April, 1, 2, 3, 4, 5
May, 7.

THE PROVINCE OF BENGAL

v.

JOY NARAYAN FATEPURIA AND OTHERS.*

Jurisdiction—Land Acquisition Act (I of 1894), section 18—Reference apparently by some of the claimants but virtually by all—Mitakshara joint family—Method of valuation of land—Calcutta Improvement (Appeals) Act (XVIII of 1911), section 3.

In the circumstances of the present case, the Land Acquisition Collector acted within his jurisdiction in going beyond the reference made under section 18 of the Land Acquisition Act and increasing the Collector's award in favour of the claimants who did not make the reference, in the reference made by other claimants.

Bejoy Chand Mahatap Bahadur v. P. K. Moosundar (1) and *Surendra Nath Tagore v. K. S. Banerjee and others* (2) applied.

As to the method of valuation of land, no hard and fast rule can be laid down, each case must be considered in view of its own special features: *Nitya Gopal Sen v. The Secretary of State for India in Council* (3).

It was contended that the Calcutta Improvement Tribunal should have determined the basic rate per cattah on the private sale proved in the case and not on the accepted awards:

Held, that this was a matter of appreciation of evidence and of the weight to be attached to it and not a matter of principle of law or procedure which could be urged in an appeal of a limited scope as like the present one, namely, a valuation case.

Appeal by the Opposite Party.

Reference under section 18 of the Land Acquisition Act by Claimants Nos. 1 and 5 only.

The Calcutta Improvement Tribunal gave an increase of Rs. 24948-11 annas (exclusive of statutory allowance) over the award of the Collector in favour of Claimants Nos. 1 to 5.

*Appeal from Original Decree No. 183 of 1943 with Cross-objection, against the decree of N. R. Das Gupta, Esq., President of the Calcutta Improvement Tribunal, dated the 18th September, 1942.

(1) (1910) 13 C. L. J. 159.

(2) (1914) 29 C. W. N. 340.

(3) (1931) I. L. R. 53 Calc. 921 (925).

The material facts appear from the judgment.

Messrs. S. M. Murshed and L. M. Bakshi for the Appellant.

Messrs. Surendra Madhab Mallik, Satyendra Nath Mitra and Upendra Chandra Mallik for the Respondents.

C. A. V.

The judgment of the Court was delivered by

Akram, J. :—This is an appeal in a Land Acquisition Case from the decision of the President, Calcutta Improvement Tribunal; it relates to valuation regarding the acquired premises Nos 24 Cockler Lane and 45 Lake Road. Admittedly Claimants Nos. 1 to 5 are joint owners of the said property having therein the following shares :—

Claimant No. 1	Joynarain Fatehpuria	1/5
" " 2	Gourisankar "	1/5 (now dead)
" " 3	Nagarmal "	3/10
" " 4	Sitaram "	1/10
" " 5	Mohan Lall Sew Lall (firm)	1/5

Claimants, 1, 2 and 3 are brothers, Claimant No. 4 is the son of claimant No. 2 and claimant No. 5 as an outsider purchaser. We are not concerned here with the claimant No. 6 who asserted that he was a lessee of the trees upon land. The land is an irregular piece of land running east to west, measuring 4 Bighas 8 Cottas and abutting to the west on a narrow lane called Banamali Bidyasagar Lane and to the south on the open lands of the Calcutta Improvement Trust. The Land Acquisition Collector awarded Rs. 40,000 for the lands of the said premises but the claimants were not satisfied with it, they refused to accept the award and asked for reference under section 18 of the Land Acquisition Act by making two applications through their Advocate, Mr. S. N. Mitra, one application was for Joynarain Fatehpuria and others and the other for Mohan Lall Sew Lall (Firm) but the Land Acquisition Collector made the reference in respect of Joynarain and Mohan Lall claimants Nos. 1 and 5 only, taking the view that the learned Advocate Mr. S. N. Mitra appearing in the case was not authorised by his Vakalatnama to act for claimants 2 to 4. The Tribunal however enhanced the valuation of the entire area to Rs. 64,948-11 as thus giving an increase of Rs. 24,948-11 (exclusive of the statutory allowance) over the award of the Collector.

Civil

1946.

The Province of Bengal

v.
Joy Narayan Fatehpuria.

May. 7.

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The Province of
BengalJoy Narayan
Fatehpuria.

Akram, J.

Against the decision the Province of Bengal preferred the present appeal while claimants 1 to 5 filed cross-objection. It is urged by the learned Advocate for the appellant that the Tribunal acted illegally and without jurisdiction in going beyond the reference and increasing the Collector's award in favour of the claimants 2 to 4 also, when the reference was made for the claimants Nos. 1 and 5 only. *Kanti Mahanti v. Special Deputy Collector Harbour Acquisition, Visagapatam* (1). In answer to that the learned Advocate for the respondent points out that the heading in the petition for reference showed "Joynarain Fatehpuria and others" as "claimants", that in the claim petition, the claimants 1 to 3 had themselves put their signatures while the claimant No. 4 was represented by the claimant No. 1 as Executor, and all the four claimants had appeared through the same Advocate Mr. S. N. Mitra in the Claim case who filed the reference petition subsequently; that no objection on the score of want of authority in the Advocate, Mr. S. N. Mitra, was ever raised either before the Land Acquisition Collector or before the Tribunal; in the above circumstances it is argued that it was not open for the appellant to put forward such a technical objection for the first time in the appeal and the same should be considered to have been waived, *Sri Kanchumari Venkata v. The Secretary of State for India* (a).

The learned Advocate also draws our attention to the fact that in the Memorandum of Appeal itself in this Court the claimant No. 1 Joynarain was impleaded as respondent "for self and a Karta of the Mitakshara reunited Joint Family consisting of himself 2. Nagarmall Fatehpuria, 3. Sitaram Fatehpuria all of 23 Mukhtaram Babu Street, Calcutta and representing 4/5th share in the property."

It seems to me that there is much force in the respondent's contention but apart from it the facts and circumstances of the case viz, that the claimants 1 to 4 (respondents) are very close relations, that they live in the same house, that they refused to accept the award and made a joint petition for reference, that they have been described even by the appellant in their Memorandum of Appeal as constituting a Mitakshara reunited Joint Family, represented by Joynarain Claimant No. 1 indicate to my mind that throughout the proceedings Joynarain claimant No. 1 was acting not only for himself but also for the benefit of his brothers and nephew the claimants 2 to 4. In this view of the matter it would be unnecessary for Mr. S. N. Mitra, to be separately authorised by

(1) [1927] A. I. R. Mad. 114.

(a) (1931) 53 C. L. J. 302; 35 C. W. N. 560.

claimants 2 to 4. I am therefore inclined to hold that the increase given by the Tribunal would accrue for the benefit not only of claimant No. 1 but of the claimants Nos. 2 to 4 as well. Reference in this connection may be made to the cases of *Bejoy Chand Mahatap Bahadur v. P. K. Mowmdar* (1) and *Surendra Nath Tigore v. K. S. Bonnerjee and others* (2), the principle of which in my opinion applies to the facts and circumstances of the present case.

Next it is urged by the appellant that the Tribunal committed an error of law by giving a flat rate per cottah for the entire land treated as a single block and by not dividing the land into successive belts and giving a diminishing rate according to the several belts into which the lands fell, it appears however that the learned Judge has considered this matter and on a consideration of the situation, size, shape and frontage of the land came to the conclusion that the belting method is not a suitable one in the present case for the purpose of valuation. I do not think that he has committed any error of law regarding this matter or applied any wrong principle in fixing an average rate per Cottah on the basis of the accepted awards; no hard and fast rule can be laid down and each case must be considered in view of its own special features: *Nitya Gopal Sen v. The Secretary of State for India* (3).

In my opinion both the contentions fail and the appeal must therefore be dismissed with costs, we assess the hearing fee at 15 Gold Mohurs.

As regards the cross-objection the only point taken is that the Tribunal should have determined the basic rate per Cottah on the private sale proved in the case and not on the accepted awards, but this I think is a matter of appreciation of evidence and of the weight to be attached to it and not a matter of principle of law or procedure which can be urged in an appeal of a limited scope like the present one (See section 3 Act XVIII of 1911).

In my opinion the cross-objection also must therefore be dismissed but without costs.

A. T. M. *Appeal and cross-appeal dismissed.*

(1) (1910) 13 C. L. J. 159.

(2) (1942) 29 C. W. N. 340.

(3) (1931) I. L. R. 59 Calc. 921 (925).

Civil.

1946.

The Province of

Bengal

v.

Joy Narayan

Fatopur,

Akron, J.

Before Mr. Justice A. S. M. Akram.

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1946.

May, 22.

NAKSETAN BIBI (MINOR)

REPRESENTED BY HER NEXT FRIEND FATHER

FARIJAN MANDAL

v.

HAIBAR RAHAMAN MANDAL.*

Suit, maintainability of—Suit for dissolution of marriage by minor Mahomedan girl, without next friend—Civil Procedure Code (Act V of 1908), Order 32 Rule 1—Indian Majority Act (IX of 1875), section 2(a)—‘To act.’

The institution of a suit by a Muslim minor girl, who has attained her puberty, for dissolution of marriage, being an act in the matter of marriage within the meaning of section 2(a) of the Indian Majority Act, without a next friend despite order 32 rule 1 of the Code of Civil Procedure, is valid.

Ahmed Sulaman v. Bai Fatma (1) followed.

Appeal by the Plaintiff against an order of remand passed by the Appellate Court.

Suit for dissolution of marriage under Act III of 1939.

The material facts appear from the judgment.

Messrs. Hem Chandra Dhar and Provash Chandra Bose for the Appellant.

Mr. Apurbadhan Mukherji for the Respondent.

The following judgment was delivered :

Akram, J. :—This appeal by the plaintiff arises out of an order of remand passed in a suit for dissolution of marriage under Act III of 1939.

Shortly stated the material facts of the case are as follows:—Plaintiff was born in 1929 and married to the defendant in 1937. There was disagreement between the parties and the plaintiff

* Appeal from Appellate Order No. 165 of 1944, with cross-objection and application, against an order of P. Sen, Esq., Additional District Judge of Murshidabad, dated the 16th March, 1944, reversing that of Woosahur Basu Mazumdar, Esq., Munsiff, 1st Court, Jangipur, dated the 30th June, 1943.

instituted the present suit in 1943 on diverse grounds for the dissolution of her marriage; one of the pleas, amongst others, taken by the defendant husband in his defence was that the plaintiff being a minor could not bring the suit without a next friend and the suit as framed was therefore not maintainable; the issue raised in this connection was issue No. 1, namely, "Is the suit maintainable in the present form." Regarding this issue, which was tried along with the other issues in the case, the learned Munsiff observed as follows:—"There is no defect in the framing of the suit. The issues framed by me are answered by me thus: (1) the suit is maintainable in the present form.".....; and upon his finding in favour of the plaintiff in respect of the other issues also, he decreed the suit. The defendant thereupon appealed and the learned Judge in the Court of appeal below by his order dated the 16th March, 1944, set aside the judgment and the decree of the trial Court and remanded the case for a fresh trial observing in the course of his judgment as follows:—"The defendant in para. 3 of his written statement has taken the objection that the suit cannot be maintained by the plaintiff as she is still a minor. An issue was accordingly raised whether the suit is maintainable in the present form. Unfortunately however this point has been completely overlooked by the learned Munsiff. The defendant in his ground of appeal has taken the selfsame objection." He also by his order dated the 13th March, 1944 allowed the amendment of the memorandum of appeal and the plaint by putting therein the father of the plaintiff as her next friend and guardian. Against the order of remand the plaintiff has preferred the present appeal and has objected therein in her grounds of appeal to the order of amendment of the plaint and the memorandum of appeal, which was passed by the learned Judge. The defendant also has filed a cross-objection against the decision of the Court of appeal below.

It is urged by the learned Advocate for the appellant that the Court of appeal below had failed to notice that the trial Court had recorded its finding as to the maintainability of the suit by holding that the suit as framed was maintainable while deciding issue No. 1. It is further urged that in view of section 2 of the Majority Act LX of 1875 the Court of appeal below is in error in holding that the plaintiff was not entitled to sue without a next friend despite order 32, rule 1 of the Code of Civil Procedure. It is pointed out that the plaintiff who was a Muslim girl, having attained her puberty as found by the trial Court, ceased to be a minor under her personal law and was competent to sue in her own name.

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Halbar Rahaman
Mandal.
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Mandal.

Abram, J.

Reference in this connection was made to the cases of *Ahmed Suloman v. Bai Fatema* (1); *Fatma-Khatun v. Fasal Karim* (2), *Shirinbai v. Kharshedji* (3); *Mussamat Alia Begum v. Mohammed Ibrahim* (4). On the other hand it is urged by the learned Advocate for the respondent that section 2 of the Majority Act IX of 1875 does not obviate the necessity of appointing a next friend or a guardian of a person below the age prescribed as his age of majority under section 3 of the Majority Act; and all that it does is to confer competency on the minor to enter into certain transactions which would be forbidden to him under section 11 of the Contract Act. It is said that capacity to contract is something different from capacity to sue and section 2 of the Majority Act does not affect order 32 of the Code of Civil Procedure which must be complied with. Furthermore it is argued that in any event a suit for dissolution of marriage does not cover "the capacity of any person to act in the matter of marriage" as contemplated under section 2 of the Majority Act IX of 1875; and reference is made to the cases of *Pyrikulh Ithayi Umah v. Kairkhirapohil Mamed and another* (5) and *Usman Ali Khan v. Mussamat Khatoon Bannu* (6).

It is obvious that the question of the maintainability of the suit was decided by the trial Court while recording its decision on issue No. 1, although no reasons were assigned in support of it. The remark therefore made by the learned Judge to the effect that this point had been completely overlooked by the learned Munsiff does not seem to me to be justified, however, the matter in my opinion depends entirely upon the construction to be placed on section 2, clause (a) of the Indian Majority Act. The material portion of that section runs as follows:—"Nothing herein contained shall affect the capacity of any person to act in the following matters, namely, marriage, dower, divorce and adoption," section 3 of the said Act which prescribes the age of majority as 18 years and in certain circumstances 21 years begins with the opening words "Subject as aforesaid", which means subject to section 2 aforesaid. The question, therefore, which arises is whether the institution of a suit by a Muslim minor girl, who has attained her puberty, for dissolution of marriage is a matter covered by the expression "the capacity

(1) (1930) I. L. R. 55 Bom. 160.

(2) (1928) 47 C. L. J., 379.

(3) (1896) I. L. R. 22 Bom. 430.

(4) [1916] A. I. R. All. (P. C.) 230.

(5) (1881) I. L. R. 3 Mad. 248.

(6) (1941) I. L. R. 17 Luck. 572.

of any person to act in the matter of marriage divorce etc." mentioned in section 2 of the Majority Act, as observed in the case of *Shirinbai v. Kharshedji* (1) that the Majority Act does not use the expression 'capacity to contract', but 'capacity to act' "which is of much wider import". I am also inclined to think that the section does not merely create certain exceptions to section 11 of the Contract Act, but the words 'to act' are wide enough to include in it the institution of a suit by a minor, who under her personal law may have attained majority. This view of the matter also finds support from the case of *Ahmed Sulaman v. Bai Fatema* (2). It would be profitable in this connection to refer also to the case of *Fatima Khatun v. Fasal Karim* (3). Considering every thing I am of opinion that the contention put forward by the appellant is well founded and should be given effect to. It should be noted that the case of *Puyikuth Ithayi Umah v. Kairikizhokil Mamud and another* (4) was for recovery of stridhan also and clearly would not be covered by section 2 of the Majority Act. This case has been discussed and noticed in the case of *Shirinbai v. Kharshedji* (1) and distinguished. To institute a suit for dissolution of marriage is clearly in my opinion to act in the matter of marriage.

I, accordingly, allow this appeal, set aside the judgment and decree of the Court of Appeal below and direct that the appeal be reheard and disposed of on the merits in accordance with law.

The order of the amendment of the plaint and the memorandum of appeal, dated the 13th March, 1944, must as a result of my decision, be also set aside.

The appellant is entitled to her costs in this Court, which I assess at three gold mohurs.

In view of my decision in the appeal the cross-objection by the defendant is dismissed, but there will be no order as to costs.

No order is necessary on the application filed in the alternative under section 115 of the Code of Civil Procedure.

Leave to appeal under clause 15 of the Letters Patent prayed for is refused.

A. T. M.

*Appeal allowed. Cross-objection dismissed.
Rule discharged.*

(1) (1896) I. L. R. 22 Bom. 430.

(2) (1930) I. L. R. 55 Bom. 160.

(3) (1928) 47 C. L. J. 372.

(4) (1881) I. L. R. 3 Mad. 248.

Civil.

1945.

Naksetan Bibi

v.
Halbar, Rahaman
Mandal.

Ahram, J.

*Before Mr. Justice B. K. Mukherjee and Mr. Justice
Sharpe.*

Civil.

1945.

August, 26.

SREEMATI KARUNAMAYEE DEBI

v.

SREEMATI MAYAMOYEE DEBI.*

Hindu lady—Deed of surrender, not a transfer—Article 33, Stamp Act (II of 1899), no application—Pardanashin lady, deed by—Court's duty to satisfy itself about such transactions—Undue influence, principles to decide—Independent legal advice, meaning of—General principles—Bona fide purchaser for value without notice—Equity against—General principles.

Deed of surrender does not in law or in fact purport to transfer any property. The Hindu widow merely withdraws herself from the estate and the next heir steps into the inheritance as a matter of law without any consent or acceptance on his part. The basis of the doctrine of surrender is the self-effacement of the widow's interest, and not the *ex facie* transfer by which such effacement is brought about.

In re : Khetramoni Debys (1) not followed.

Pyila Sitarna v. Nartanda (2) ; *Janaki Nath Ray v. Jyotish Chandra* (3) referred to.

The interests obtained by undue influence cannot be held by third parties although innocent of fraud. But no equity can be enforced against a person who is a bona fide purchaser for value without notice.

Huguenin v. Baseley (4) referred to.

It is the duty of the Court before upholding transactions with a Pardanashin lady to satisfy itself that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed and that there was no undue influence or misrepresentation.

Sumit Bala Debi v. Dhara Sundari Debi Chandkurani (5) relied upon.

Independent legal advice is certainly not in itself essential. What is necessary to establish is that the import of the document was brought home to the mind of the guarantor and that she really understood and meant to

* Appeal from Original Decree No. 143 of 1941 with Cross-objection against the decree of N. C. Bhowmik, Esq., Subordinate Judge, Burdwan, in Title Suit No. 28 of 1939, dated the 31st of March, 1941.

(1) (1937) I. L. R. 17 Pat. 95.

(2) (1934) 38 C. W. N. 697 ; L. R. 68 I. A. 200 ; 59 C. L. J. 354.

(3) [1941] I. L. R. 1 Cal. 234.

(4) (1807) 14 Ves. 273.

(5) (1919) L. R. 46 I. A. 272.

make the transfer. If the settlor's freedom and comprehension can be established by evidence or if it is proved that the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor and were then substantially embodied in deed, there would be nothing further to be gained by independent advice.

Faridunnisa v. Mukhtar Ahmad (1) referred to.

It is enough if the general result of the transaction is understood by the lady, it is not necessary that she should understand each detail of a matter which might be involved in legal technicalities.

Smithbale's case (2) referred to.

If those founding on a deed by a pardanashin woman fail to show that the grantor intelligently understood the deed there is an end of the matter. But even if intelligent understanding of the deed is established, a question of undue influence may still arise.

Bank of Khulna Ltd. v. Jyoti Prakash Mitra (3) referred to.

Such influence may be direct and expressly used by the decree for the purpose, or the relation between the donor and the donee may be such as to raise a presumption of undue influence.

Where mere undue influence is alleged it is necessary to examine very closely all the circumstances of the case. The principles are always the same though the circumstances differ, and as a general rule the same questions arise. The questions enunciated are: (A) Was the transaction a righteous transaction, i. e., was it a thing which a right minded person might be expected to do? (B) Was it an improvident Act?, that is to say does it show so much improvidence as to suggest the idea that the lady was not mistress of herself and not in a state of mind to weigh what she was doing? (C) Was it a matter requiring a legal adviser? (D) Did the intention of making the gift originate with the donor?

Mahomed Buzah v. Hossain Bibi (4) relied upon.

Appeal by the Plaintiff.

Suit for declaration that a deed of surrender should be set aside and the estate should be partitioned.

Material facts will appear from the judgment.

Messrs. Panchanan Chaudhuri and Bijoy Kumar Bhose for the Appellant.

Messrs. Chandra Sekhar Sen, Jagannath Gangopadhyaya and Amiya Chandra Mukherjee for the Respondents Nos. 2 to 5.

(1) (1925) L. R. 52 I. A. 342; I. L. R. 47 All. 703; 42 C. L. J. 531.

(2) (1919) L. R. 46 I. A. 272 (278).

(3) (1940) L. R. 67 I. A. 377.

(4) (1888) L. R. 15 I. A. 81; I. L. R. 15 Cal. 414.

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moyee Debi

v.
Sreemati Maya-
moyee Debi.

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Sreemati Karuna-
moyee Debi

v.

Sreemati Maya-
moyee Debi.

Messrs. Gopendra Nath Das and Probhas Chandra Chatterjee
for the Respondent No. 7.

Messrs. Riskindra Nath Sarkar and Paritosh Sarkar for the
Respondents Nos. 9 and 10.

Messrs. Pramatha Nath Mitra and Khitindra Nath Basu
for the Respondent No. 11.

Messrs. Satindra Nath Mukherjee, Samarendra Nath Mukherjee
and *Krishna Lal Banerjee* for the Respondent No. 14.

C. A. V.

The judgment of the Court was as follows :

August, 26.

This appeal arises out of a suit brought by the appellant Karuna-moyee Debi to obtain a declaration that a deed of surrender executed by her and by her sister Mayamoyee Debi defendant No. 2, on the 2nd Baisakh, 1343 B. S. corresponding to the 15th April, 1936, in favour of her son Mahadeb (defendant No. 1) and defendants Nos. 3 to 6, the sons of defendant No. 2, should be set aside, and that the estate left by her father, the late Bhabadeb Chatterjee, should be partitioned between her and her sister Mayamoyee. There was an alternative prayer that if the deed of surrender could not be set aside or the estate partitioned the plaintiff might be given maintenance at the rate of Rs. 100 per month charged on all the properties left by her father. By a subsequent application a claim for right of residence in the residential house of Bhabadeb Chatterjee at Burdwan was included in the plaint.

The main facts of the case are not disputed and are as follows :—

Bhabadeb Chatterjee, father of the plaintiff, died on the 14th August, 1935, leaving the plaintiff Karunamoyee and defendant No. 2 Mayamoyee as his only heirs under the Hindu Law. Prior to his death he executed certain documents all of which were unregistered. The first was a Will of the year 1923, the second a deed of gift dated the 20th July, 1935, in favour of Karunamoyee, the third Will dated the 22nd July, 1935, the fourth a deed of gift dated the 24th July, 1935, in favour of Mayamoyee, and the fifth a deed of trust dated the 6th August, 1935, appointing Dr. Debendra Nath Mukherjee, the husband of Mayamoyee, and certain other gentlemen as trustees. After his death the plaintiff applied for probate of the Wills, but probate was refused of the first because a later Will was in existence and of the second, because some pages were missing. No effect could be given to the deeds of gift or to the deed of trust as they were

not registered. After Bhabadeb's death his property was looked after by Mahadeb, the plaintiff's son, and by Dr. Debendra Nath Mukherjee, the husband of defendant No. 2, and later an Ammuktearnama was executed by both the sisters on the 22nd September, 1935, in favour of Mahadeb for management of the entire estate. As Karunamoyee had been ill after her father's death she went to Puri for a change sometime in October, 1935, and whilst there she had certain correspondence with her sister Mayamoyee and Mayamoyee's husband, Dr. Debendra Nath Mukherjee. It transpired that Mahadeb's management of the estate was proving unsatisfactory. Karunamoyee returned to Calcutta about the 19th March, 1936, and on or about the 22nd March following the Ammuktearnama executed in favour of Mahadeb was cancelled. Thereafter, there was certain discussion with regard to the management of the property and eventually on the 15th April, 1936, Karunamoyee and Mayamoyee executed the deed of surrender, which forms the basis of this suit, whereby they surrendered the entire property left by their father in favour of their sons, defendant No. 1 and defendants Nos. 3 to 6 respectively. The property which was surrendered was included in a schedule and valued at Rs. 12,718 but there was a further provision that if any property had been omitted it would also be covered by the deed. By the surrender Karunamoyee and Mayamoyee divested themselves of all their father's property, without any provision for maintenance. On the same day a deed of partition was executed by and between Mahadeb and defendants Nos. 3 to 6, the four sons of Mayamoyee, which purported to divide the property between them in proportion of one-fifth and four-fifths respectively. The properties which each would get were specified in schedules attached to the deed. The value of Mahadeb's share was stated to be Rs. 15,956 out of the total property which was valued at Rs. 80,115 annas odd, the balance being the value of the property allotted to defendants Nos. 3 to 6.

It is the case for the plaintiff that she signed the alleged deed of surrender without understanding or appreciating its contents, that the deed was neither read over nor explained to her and she had no independent advice in the matter. It is said that the plaintiff had absolute confidence in Dr. Debendra Nath Mukherjee, her sister's husband, and the latter having got the plaintiff's son Mahadeb over to his side, had the deed of relinquishment executed by the plaintiff representing to her that the document was abso-

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lutely necessary, to save the estate of her father from ruin. Following the deed of surrender the defendants it is said in collusion with each other created certain deeds of transfer and mortgage, and defendant No. 1 purported to transfer by way of sale or mortgage almost all the properties which he obtained on the basis of the deed of partition. Besides defendants Nos. 1 to 6 who were parties to the deed of surrender, the plaintiff impleaded as parties defendants the subsequent purchasers or mortgagees of different items of property from Mahadeb and they are defendants Nos. 7 to 15 in the suit.

Defendant No. 1 did neither appear nor contest the suit. Defendants Nos. 2 to 5 put in one joint written statement traversing all the allegations of the plaintiff and contending inter alia that the deed of surrender was a valid and proper document which was binding on all the parties and could not be set aside. Separate contest was entered on behalf of defendants Nos. 7, 8, 9, 10, 11, 14 and 15. All of them supported the deed of surrender and contended further that they were bona fide transferees for value without notice.

The issues as finally framed were as follows :—

3. Is the plaintiff entitled to any maintenance? If so, at what rate and from whom? Is the maintenance a charge upon property? If so, upon what property?

4. Is the plaintiff entitled to any decree for alleged arrears of maintenance? Is the plaintiff entitled to any decree for alleged arrears of interest, if so what is the amount thereof?

5. Has the plaintiff any right of residence in the house of Burdwan which the defendant No. 1 mortgaged to defendant No. 7? If so, in what portion?

6. Is the deed of surrender dated the and Baisakh 1343 B. S. voidable? Can the plaintiff avoid it?

8. Is the plaintiff's claim barred by the rules of estoppel waiver and acquiescence?

9. Is the suit bad for misjoinder of parties and cause of action?

10. Is the plaintiff entitled to recover possession either against defendants Nos. 3 to 6 only or against other defendants as well who are transferees from defendant No. 1.

11. Has the plaintiff cause of action? To what relief, if any, is the plaintiff entitled?

The learned Subordinate Judge held in regard to Issue No. 6 that the deed of surrender was not a voidable document and

that the plaintiff could not avoid it. In his opinion the idea of partition originated with Karunamoyee herself, she was sufficiently intelligent to understand what was being done and the effect of the deed of surrender was in any event fully explained to her. The deed of surrender was executed at the instance of Mahadeb with a view to a partition of the entire property between himself and the sons of Mayamoyee, and Dr. Debendra Nath Mukherjee not only was not responsible but tried to safeguard her interest. In answer to Issue No. 8 the learned Subordinate Judge held that there was no general bar but that the rules of waiver estoppel and acquiescence operated as a bar in so far as the claim against defendant No. 7 was concerned. Issue No. 7 was answered in the plaintiff's favour. In respect of Issue No. 10 it was held that the plaintiff was not entitled to recover possession against defendants Nos. 3 to 6 or any other defendants who were transferees from Mahadeb, defendant No. 1. In answer to Issues Nos. 3 and 4 the learned trial court held that the plaintiff was entitled to maintenance at the rate of Rs. 100 per month from her son Mahadeb and that this should be a charge on whatever property remained in the hands of Mahadeb, and whatever property he transferred to such transferees who are not bona fide purchasers for value without notice. He held that the plaintiff was also entitled to a sum of Rs. 3,600 as arrears of maintenance for three years and directed that this would be a charge on the property in the hands of Mahadeb and on premises No. 14C, Panchu Khansama Lane and Putni Lot Jalkarghia. He allowed the plaintiff a sum of Rs. 2,000 on account of the marriage expenses of her youngest unmarried daughter and directed that this would also be charged on the property charged for her maintenance. His decision on Issue No. 5 was that the plaintiff was not entitled to any right of residence in the Burdwan house, but that she had a right of residence in the Saknara house of her father Bhabadeb. He decreed the plaintiff's suit in part in accordance with these decisions. The plaintiff has now appealed.

Cross-objections have been filed by respondents Nos. 11 and 14. Respondent No. 11 is the purchaser of premises No. 14C, Panchu Khansama Lane over which a charge for the plaintiff's maintenance was declared by the learned Subordinate Judge; while respondent No. 14 purports to have purchased the Saknara house in which the plaintiff has been given a right of residence. Putni Lot Jalkarghia, we are told, has been sold under Regula-

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tion VIII of 1819 and a portion of the sale proceeds is still lying with the Collector.

The learned Advocate appearing in support of the appeal has raised three points on behalf of his client. It is contended in the first place that there was no free and intelligent execution of the deed of surrender by the plaintiff who as a purdanashin lady was absolutely under the control of her brother in law Dr. Debendra Nath Mukherjee and her son Mahadeb; that she neither appreciated the contents of the deed nor its legal effect and the same were not properly explained to her. The whole transaction it is said was vitiated by undue influence which was exercised upon the plaintiff by her brother in law Dr. Debendra Nath Mukherjee in conspiracy with Mahadeb. The second contention raised is that the document of surrender is invalid for want of proper stamp and registration. The third and the last point put forward by the learned Advocate is that the plaintiff should have been given a decree for maintenance against all the defendants and it ought to have been declared a charge on all the properties left by her father.

The first point is really the most material point in the case and requires careful consideration. We were taken through the evidence both oral and documentary, at considerable length by the learned Advocates for both parties and after the hearing had proceeded for some days we decided, that it was necessary for the ends of justice and for the proper disposal of the appeal that we should take the evidence of Jibandhan Ganguly who was said by all the defendants' witnesses, who gave evidence to the execution of the deed of surrender, to have been present at the preliminary discussions and to have explained to the plaintiff the purport and effect of the proposals. We thought his evidence to be particularly necessary because the evidence disclosed that he is the plaintiff's son in law; and amongst the persons alleged to have been present he was most closely connected with her and might be expected to have taken a genuine interest in her welfare and protection. We felt too that if his evidence supported the defence case, we could safely hold that there was no want of intelligent understanding on the part of the plaintiff or any undue influence leading to the execution. The evidence of Jibandhan Ganguly was accordingly taken by us on the 24th June, 1946, and it forms part of the record. The evidence we may say at once substantially supports the plaintiff's case and is materially damaging to the defence; he has given a total denial

to the defence evidence that he was present at the time of the preliminary discussions about the deed of surrender or that he had at any time any discussion with the plaintiff in regard to the deed or that he explained to her its purport or effect. Indeed, his evidence goes further and indicates that Dr. Debendra Nath Mukherjee suggested to him that the property should be divided between the grandsons of Bhabadeb, and that he took strong exception to the suggestion, mainly because he was aware that Bhabadeb had left a Will. We realise that it is unfortunate and to some extent unsatisfactory, that this witness was not examined at the time of trial, but for this, we think, both parties are equally to blame. We realise too that the evidence of this witness may be biased in favour of the plaintiff, whose interest he may be expected to support in preference to that of the defendants; but he is a respectable gentleman and although we think his evidence may be tinged with exaggeration and that he may not be entirely accurate in his recollection or in his interpretation of the proposals made to him by Dr. Debendra Nath Mukherjee we were on the whole favourably impressed by his demeanour and his general statement; and we cannot easily discard his positive denial of those material facts in regard to preliminary discussions prior to execution of the document, which he is certainly in a position to know and to remember without any possibility of mistake or confusion.

Now, the plaintiff asserts that she is a purdanashin lady and this fact is not seriously challenged by the other side. The protection given under the Indian law to purdanashin ladies is given to persons who are really kept in seclusion and have little or no commerce with the outside world. The plaintiff belongs to a conservative Brahmin family. She was a widow of about fifty years of age at the time when the deed of surrender was executed and there is no substantial evidence that she had at any time any concern in the management of or dealings with any property. She can therefore claim the protection which the Indian law throws round persons who transfer their property to their own disadvantage when they have not the usual means of fully understanding the nature and effect of what they are doing. The law relating to purdanashin women is well settled. It is the duty of the court before upholding transactions with a purdanashin lady to satisfy itself that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed,

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and that there was no undue influence or misrepresentation. [Vide *Suniti Bala Debi v. Dhara Sundari Debi Chowdhurani* (1)]. Independent legal advice is certainly not in itself essential. The presence or absence of independent legal advice is only relevant to a decision of the question as to whether or not the grantor thoroughly comprehended and deliberately of her own free will carried out the transaction. What is necessary to establish is that the import of the document was brought home to the mind of the grantor, and that she really understood and meant to make the transfer. If, the settlor's freedom and comprehension can be established by evidence or if it is proved that the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor, and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice. [Vide *Farid-un-nisa v. Mukhtar Ahmad* (2)]. The Judicial Committee further held in *Sunitibala's* case (3) that it is enough if the general result of the transaction is understood by the lady, it is not necessary that she should understand each detail of a matter which might be involved in legal technicalities. If those founding on a deed by a purdanashin woman fail to show that the grantor intelligently understood the deed there is an end of the matter. But even if intelligent understanding of the deed is established, a question of undue influence may still arise. [Vide *Bank of Khulna Limited v. Jyoti Prakash Mitra* (4)]. Such influence may be direct and expressly used by the donee for the purpose, or the relation between the donor and the donee may be such as to raise a presumption of undue influence.

We will proceed to examine the entire evidence adduced in this case in the light of the principles laid down above. It must be admitted that the evidence which the plaintiff offered in support of her own case was neither substantial nor particularly satisfying. Indeed, apart from her own testimony there is little evidence which is of value. But as the burden lies upon the defendants to establish that there was free and independent understanding of the contents of the deed by the plaintiff we will have to examine closely the evidence adduced by the defendants taken along with the facts and circumstances of this case. The plaintiff as stated above, is a

(1) (1919) L. R. 46 I. A. 272.

(2) (1925) L. R. 52 I. A. 343; I. L. R. 47 All. 703; 42 C. L. J. 531.

(3) (1919) L. R. 45 I. A. 272 (278).

(4) (1940) L. R. 67 I. A. 377.

purdanashin woman, but she is certainly not illiterate. The various letters written by her which are exhibits in this case prove conclusively that she can read and write Bengali fairly well. Her evidence that she can only sign her name is clearly untrue and was evidently given on improper advice. The evidence also shows that she possesses fair and average understanding. Her son witness Satya Prokash says that after her father's death she used to look after the latter's properties. This obviously means that she looked to some extent after the residential house at Burdwan and the properties situated near about that place. Now the evidence shows that when Bhabadeb died in August, 1935 both the daughters were with their father at that time. The younger daughter Mayamoyee came down to Calcutta very soon afterwards, while the plaintiff who ordinarily resides with her father at Burdwan, remained there for some time more. Admittedly she was not in good health at that time and as she was anxious to go away for a change an Am-muktarnama was executed by her along with her youngest sister in favour of Mahadeb, her son, by which the charge of the entire property was given to Mahadeb. This Am-muktarnama was executed on the 22nd September, 1935, and soon afterwards the plaintiff went to Puri for a change taking some of her daughters with her. Mahadeb, it is admitted by everybody was and is a man of intemperate and vicious habits. Why he was at all selected to be an Am-mukhtar it is difficult to see. The suggestion is that both his mother as well as Dr. Debendra Nath Mukherjee thought that the burden of responsibility which was thrown upon Mahadeb might have the effect of improving his character and making him sober and steady. Any way the experiment did not prove to be a success. There were complaints made to Karunamoyee both by her sister as well as by Debendra complaining of acts of indiscretion and mismanagement committed by Mahadeb. They are clearly proved by letters, Exhibits V(5), V(3), V(8) and V(10). The main charge against Mahadeb seems to be that he was committing default in the payment of Government revenue and rent to superior landlords and the putni properties were in danger of being sold for non-payment of rent. These letters further show that the plaintiff had a high regard for Debendra and was ready and willing to abide by his advice in all matters relating to the management of the estate. From the letters one gets the idea that some sort of partition was suggested by Debendra or his wife as the proper way of preserving the property, but in what form exactly the partition was suggested it is difficult to say. In the letter, Exhibit V(5), the plaintiff was asking Debendra

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to come down to Puri inasmuch as she was unable to leave the place owing to the illness of her daughter.

"..... it is not possible for me to go to you. Better come once.....I shall also be free from this anxiety about Una and something will be settled regarding the other matters as well. I will not fail to agree to this." The latter portion of this letter is somewhat important and runs as follows :—

" well, you see that you will be able to manage your affairs even without the properties given by father but without the same the marriage of my youngest daughter and my maintenance and looking after my daughters, everything will be stopped and I shall have to pass my life in endless misery. It is superfluous for me to write to you about this. You are like my younger brother, so I gave my consent to whatever you said."

In the letter, Exhibit V(3) she writes to her sister and brother-in-law inter alia as follows :—

"In any event you two, Mahadeb and Harigopal should meet together and formulate a scheme of partition and write to me about the properties allotted to each share. After that I shall give my opinion..... .

".....after partition each one will be able to borrow money for his own needs".

We do not get any indication and in fact it is not the case of the respondents that any scheme of surrender followed by a partition amongst the grandsons was contemplated by the plaintiff or was suggested by her sister or brother-in-law. On the other hand it is clear from the letters that the plaintiff was least inclined to efface herself from the world leaving her property to her son or sister's sons. She had six daughters, one of them still unmarried and some of the married daughters were more or less dependent upon her. She points out to her brother in law that so far as she was concerned her father's properties were absolutely necessary to her, while Debendra, and his family would be quite well off without these properties. It further appears from these letters that Karunamoyee herself had every reason to be dissatisfied at the conduct of her son Mahadeb. She was not getting any allowance from her son and on the other hand she was very much troubled to learn that a property which was given by her father to one of her daughters was mortgaged by Mahadeb. The evidence shows that money was sent to her by her sister's husband by telegraphic money order and with this money she came down to Calcutta on the 19th or 20th March,

1936. Three days afterwards the Am-muktearnama in favour of Mahadeb was cancelled by both the two sisters.

It is extremely difficult to determine from the evidence when and under what circumstances the proposals in regard to the execution of a deed of surrender and a deed of partition were first discussed or a decision reached. According to the evidence of Dr. Debendra negotiations with regard to the execution were carried on first with Mahadeb and later on with Mahadeb and Karunamoyee and he says that Mahadeb would not agree to the partition deed unless his mother and aunt executed the deed of surrender. Debendra says that he objected to this proposal and suggested that a common manager should be appointed. But this suggestion was rejected by Mahadeb and his mother, despite the fact that the plaintiff's son-in-law, Ganga Narayan (P. W. 2) and Jibandhan Ganguly (examined in this Court), and Hari Gopal (D. W. 2) objected vehemently and made requests to the plaintiff. Later this witness stated in cross-examination that Ganga Narayan was not present before him (Paper Book Part I P. 63) and that a few days after the plaintiff came from Puri Mahadeb arrived and "at first hot words passed and then the mother and the son became of one mind". During this time he advised that it would be prudent to appoint a common manager and Karunamoyee went to Burdwan before any settlement was reached regarding the future management of this estate. Karunamoyee returned to Calcutta ten or fifteen days later (that is about the first week of April); but before then he had gone to the Ashram about the 20th or 21st Chaitra and he returned seven or eight days later. Before his return he had learnt from his son Sushil that everything had been settled. From this evidence it would be difficult to determine whether this witness is in a position to say if the plaintiff really supported the suggestion for a deed of surrender and partition, or whether their implication was explained to her initially. Sushil the eldest son of Debendra says that Mahadeb was not in Calcutta at the time when the Am-muktearnama was cancelled. He came back to Calcutta a few days later and on hearing that the Am-muktearnama was cancelled he got frightfully incensed and began vilifying everybody not sparing even his own mother.

After this excitement subsided there were talks between the mother and the son. Both said, "let there be partition instead of this golmal", the talk being that the two sisters would divide the property between them. "We said that instead of that a common manager might manage the properties. Her son-in-law Jiban Babu

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also protested to that proposal for partition and accepted this proposal by father for appointment of a common manager. Jiban Babu tried to persuade Mashima (plaintiff) for that but she or Dada (Mahadeb) never agreed to this.....Then it was decided that the partition would take place between sister and sister and each would get properties as per the deed of gift plus other properties not covered by the same.

"Then Mashima and Dada came back to Burdwan one or two days after that Mahadeb went to Calcutta and said that such a partition could not be made but that to no effect that, first there would be deeds of surrender by mother and Mashima and then the partition would be effected. Father and we did not agree to that. Then Mahadeb said that he would bring his mother. So saying he came to Burdwan and took his mother to Calcutta again. Then we sent information to Harigopal Babu to come.....The question of surrender was the subject matter of talk amongst father, mother, Mashima, Mahadeb, Harigopal Babu and Jiban Babu. Father protested very much saying that such a thing was worse. So did myself, Harigopal Babu and Jiban Babu. Mahadeb and Mashima wanted surrender. Mashima said, 'the property which devolves upon anyone may be kept by him if he can, why should others suffer on that account. Hence the properties should be partitioned' What was then finally decided was that there would be a partition after surrender and that Mahadeb would execute a deed of maintenance of Rs. 150/- per month charging his own property. Then Dada and Mashima came back to Burdwan on 22nd Chaitra 1342"—(Vide Paper Book Part I pages 112-115). It is somewhat difficult to reconcile this evidence with that of Debendra in cross-examination, which suggests that he had gone to the Ashram before the settlement in regard to the execution of the deeds of surrender and partition was reached and before the plaintiff came again to Calcutta from Burdwan. One thing, however, is clear from Sushil's evidence, viz., that up to the date when the plaintiff went to Burdwan with Mahadeb after her return from Puri, there had been no specific suggestion for any surrender of the property and the talk up to then related to the suggestion of partition of the property between the sisters.

The evidence of Harigopal Ganguly in relation to the preliminary discussions is as follows :—

"Eight or ten days after that (apparently after the cancellation of the Am-muktearnama) I came to Calcutta and heard how the estate would be managed.

"Deben Babu said that it would best be managed by appointing a common manager and keeping the estate as a joint estate. I suggested that would not be convenient but that the two sisters might partition their life estate. At that time Jibandhan Gangopadhyaya was present and he endorsed my proposal, but Mahadeb did not agree but insisted that he would not agree to my proposal unless there would be partition after surrender of the life estates. Then both myself and Jiban Babu explained the position to Karunamoyee and put it to her plainly that if she surrendered, she would have no right to the estate which she inherited from her father. I further added that she would have in that case to depend upon the charity of her son. We said that to Mayamoyee as well." Karunamoyee said, "When Mahadeb has been demanding and ultimately he will get the property let Mahadeb's demand be complied with".....

"Lastly it was decided that the two sisters would surrender and that there would be partition amongst their sons". (Paper Book Part I, P. 119).

It would be seen from this evidence that according to Harigopal it was he who suggested that the property should be partitioned between the sisters; and that Jiban Ganguly was present and endorsed the proposal. Sushil, however, makes no mention of the presence of Harigopal when a proposal for partition amongst the sisters was made and his evidence is that the proposal emanated from the plaintiff and Mahadeb, and not only does he not say that Jiban endorsed the proposal but his evidence is that Jiban protested against it and tried to persuade them to accept the suggestion for a common manager. The evidence of Jiban Ganguly to which we have referred above, is of course that he was not present at all at these preliminary discussions and gave no advice to the plaintiff. This being the state of evidence which is, to say the least, discrepant and contradictory, it is difficult for us to say that the proposal for surrender was at all conceived by the plaintiff or even she understood it properly if the suggestion came from anybody else.

Turning now to the explanation said to have been given to the plaintiff at the time of the execution, Dr. Debendra Nath Mukherjee said that it was read to her by Nihar Ranjan Babu (D. W. 3) and explained by Hari Gopal (D. W. 2) in the presence of Mahadeb and his sons Sushil and Sunil and also of Dinabandhu Chatterjee. No one, he says, was asked to attest the deed, probably because it was not thought necessary. As Hari Gopal was a lawyer he would have it attested if there

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had been any necessity. According to Debendra, Mahadeb brought the draft with him from Burdwan.

Sushil (D. W. 1) states that after Mahadeb and the plaintiff returned to Burdwan on the 22nd Chaitra Mahadeb wrote him the post card, exhibit V (II) dated the 11th April in which it is said :

"We are having all the deed ready and Sibram Bibu says it is to be done by 2nd January, 1943, in order to enable to file suits independent of each other. I think I shall reach Calcutta on Monday 13th April. You may show the deeds to Satish Babu on that date. I have found out the Imperial Bank letter".

Two days later, he says, Mashima and Dada came to Calcutta with the drafts ; and Mahadeb, Harigopal and he went to Satish Babu, who made certain minor alterations. His father returned on the 14th April and on that night there was further talk about the deed of surrender in the presence of his father, mother, Mashima, Dada, Hari Gopal and himself. His father again protested but without avail and next day Mahadeb and Hari Gopal purchased the stamps for the deeds which were engrossed and executed. Before the execution Nihar read the documents and Hari Gopal explained the contents to his mother and Mashima and said that they were deprived of their paternal properties and that these sons would be able to do whatever they liked by sale or gift. Then his mother and Mashima said, "I know everything about this, what more has to be said about it". In cross-examination Sushil says that Jiban might have been present when the draft was discussed. He knew that the deed must be read and explained to his mother and Mashima. According to him Dinabandhu Babu (D. W. 4) was the most disinterested person at the time of the execution. But he is a tenant of the defendant and lives in a portion of the house in which Debendra Nath Mukherjee and his family reside. Sushil says too that Nihar is a disinterested person but he is an employee of the defendants and takes his food in their house. We cannot regard either of these witnesses as entirely disinterested.

Hari Gopal says that Mahadeb brought the draft deeds from Burdwan and that the draft was shown to Satish Babu pleader by Sushil, Mahadeb and himself and Satish made some formal alterations. After the deed was written Nihar read the body portion to Mayamoyee and Karunamoyee. Then the witness explained the effect of the deeds to the ladies and told them that they were divesting themselves of their rights in favour of their

sons. He asked them if the deed was in order, and they said 'yes' and executed it of their own free will and accord. They fully understood the document and its effect. He says that the same evening Jiban came to the house and Karunamoyee met him and talked with him and he was informed of the execution of the deed. At that time too it was settled that a deed of maintenance would be executed; Rs. 150 was talked of as the monthly maintenance for Karunamoyee. But when the deed was being written Mahadeb said that the amount should be Rs. 100 and Karunamoyee said, "When Mahadeb says Rs. 100 let it be so". In cross examination he said that as the deed was by females he thought it necessary to explain it to them but he did not think it necessary to note this on the document. As the deed of partition was amongst the boys and trouble might arise amongst them it was considered prudent to witness the execution of that deed.

Nihar Ranjan (D. W. 3) says he wrote the body of the deed of surrender and he read it to Karunamoyee and Mayamoyee and Hari Gopal explained it to them before execution. Karunamoyee, he says, signed after fully understanding the contents. He says too that on the 20th Chaitra Karunamoyee told him that the two sisters would surrender their estate in favour of their sons and when he said to her that there would be nothing left for her she said, "It belongs to our sons. We are giving to our sons the property due to them. Why should we stand all this botheration". According to him Hari Gopal told the ladies, "you have divested yourselves of the estate in favour of your sons who may do anything and you have no power of control over the estate now". According to him Karunamoyee looked at the deed herself for about ten minutes before she signed.

Lastly, Dinabandhu Chatterjee (D. W. 4) says that Karunamoyee asked him to be present at the time of execution. When he came he saw Nihar reading the deed to the executants and then Hari Gopal explained it to them saying that from that day they would have no right to the property and that the effect was as if they were dead and that the sons would do whatever they liked. Then the two sisters signed. Karunamoyee said, "what does it matter we know everything". Karunamoyee signed after reading it over. This witness also says that once before the deed of surrender was executed Karunamoyee asked him to take her to Apurbadhan Mukherjee, Advocate's house for con-

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sultation about the proposed deed of surrender. Apurbadhan Mukherjee was her cousin sister's son. He took her to Apurbadhan Mukherjee and came away. In answer to Court's question this witness said that the plaintiff told him that as Mahadeb was not managing the property well therefore let them so divide the properties. This she said one or two days after her return from Puri. She said she was thinking of a *tyagnama* (deed of surrender). Then he said to her, "You have got only one son. It is all the same whether the property be with you or with your son. Do what you consider best". Later he said, "I don't remember if I cautioned Karunamoyee that if she gave the property to Mahadeb, he would squander it in no time. I did not ask her to take advice of others". Further to the court he said, "I could not follow and understand the deed when Nihar Babu read it out and Hari Gopal read it to the ladies. I could understand that after Hari Gopal Babu explained its effect.....When Nihar was reading the main body of the document sheets containing the schedules were lying on the floor; when Nihar handed the main body of the deed to Hari Gopal Babu even then the sheets of schedules lay on the floor".

We think it probably in view of the foregoing evidence that some sort of explanation of the deed of surrender was given to the plaintiff and it is not unlikely that she realised that a division of her father's estate was being made and that the management and control of their shares would thereafter be in the hands of their sons. We are, however, far from being satisfied that she had any real appreciation of her own position or of the practical effect of the surrender or of the partition which was contemplated, whereby a life interest in one half of the estate was being exchanged for a permanent interest in one-fifth of the estate which Mahadeb would in any case inherit on her death. The idea of a surrender by a female owner is not quite familiar to a layman in our country, and we think that with regard to the exact effect of the deed she required legal advice. In all probability as her own evidence shows, she would have been perfectly willing to let the control of her share in the property pass on to her son. But we think it was necessary to explain to her clearly that there was no provision made either for maintenance or for residence in the deed of surrender itself, and that once the deed was executed she would have no power to compel any of the surrenderees to give her anything by way of maintenance or to make any provision for her residence in the family dwelling

house of her father. There was none to point out to her that although one of her daughters was still unmarried, the deed of surrender left her no property, with which she could defray the marriage expenses of the unmarried daughter or give any pecuniary assistance to the indigent daughters who were dependent upon her. We have doubts, as we will explain more fully later on, as to whether it was a voluntary act of self-effacement on her part by which a Hindu widow is entitled to put an end to her own rights in the property and accelerate the succession of the reversioners. It clearly appears from the evidence set out above that the draft deeds were prepared at Burdwan where the plaintiff had gone with her son Mahadeb. Up to the time of going there with Mahadeb discussions have been confined mainly to the question whether a common manager should be appointed or the estate should be partitioned between the two sisters. A few days after their going to Burdwan Mahadeb intimated his unwillingness to agree to anything short of surrender followed by partition between himself and the sons of Mayamoyee; and when the plaintiff returned to Calcutta a few days before the deeds were executed, she supported Mahadeb's demands. During all this time she had not, so far as the evidence shows, had the benefit of advice from or discussion with anyone except Dr. Debendra Nath Mukherjee, his son and Hari Gopal and even though we are not prepared to hold that they encouraged Karunamoyee to give effect to Mahadeb's demands we feel considerable doubt whether they actively opposed her. Even after her return to Calcutta from Burdwan where quite obviously she must have been subjected to Mahadeb's influence, no arrangement was made for her to have any independent advice in the matter. Dinabandhu Chatterjee has gone to the length of saying that he took the plaintiff at her request to the house of Apurbadhan Mukherjee, Advocate. The story does not seem to us to be true. The plaintiff did go to Apurba Babu it is true, but long after the deed of surrender was executed. If Dinabandhu's evidence is true the best thing for the defendant would have been to examine Apurba Babu as a witness. The most disinterested person with whom the plaintiff had any discussion according to Sushil either prior to or at the time of execution was Dinabandhu and yet Dinabandhu advised the lady when he heard that a deed of surrender was contemplated, to use his own words, "you have got only one son. It is all the same whether property be with you or with your son". We do

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not think advice of this nature was at all calculated to explain to the plaintiff the import of the proposals or what their practical effect would be.

It is not disputed that Jibandhan Ganguly was not present at the time of execution. According to Hari Gopal, Jiban came in the evening after the execution of the deed and it was not until then that it was settled that a deed of maintenance would be executed. Jibandhan Ganguly has denied going to Debendra's house at any time in connection with the deed of surrender or of having any discussion with the plaintiff about it; and we see no adequate reason for distrusting his evidence on this point. Even if he did go after the deed had been executed it seems to us extraordinary that the plaintiff should have been allowed to execute the deed before anything definite had been settled in regard to her maintenance, the marriage expenses of her unmarried daughter or her right of residence in the family dwelling house or at least before the provisions for maintenance was included in the deed itself. The parties could have been under no illusion as to Mahadeb's character or as to his previous improvident dealings with the property. It was his mismanagement which had necessitated the plaintiff's recall from Puri and a few days previously it had been found necessary to cancel the Ammuktearnama which had been executed in Mahadeb's favour. The omission to provide in the deed any safeguard for the plaintiff's maintenance or her rights of residence raises a grave suspicion that her interest was not sufficiently considered and confirms our belief that she had no proper advice which could enable her to appreciate what the effect of her action would be.

The document does not on the face of it bear any endorsement that it was read over and explained; and it was not attested. It may be for these reasons that evidence was offered that Jibandhan Ganguly, who might be regarded as a witness who would look after Karunamoyee's interest, explained the nature and effect of the proposals to her. Another fact which is established by evidence is all that was read or explained to the plaintiff was the bare body of the deed of surrender; the deed of partition was not read to her nor were the schedules of the property which was being given to Mahadeb or his cousins. At least there is no evidence that they were read over. Nihar Ranjan says that he does not remember if asked to read out the schedules, Dinabandhu says that the schedules were lying on the floor when Nihar Ranjan read and Hari Gopal explained the body of the

deed. During the course of argument it was contended for the respondents that the partition deed was made on the basis of the deeds of gift which Bhabadeb had executed in favour of Karunamoyee and Mayamoyee and that in fact approximately one-half of the property was given to Mahadeb. We find it difficult to determine from the available evidence the extent to which this contention is correct; and in any event we cannot say if these deeds of gift formed a fair or satisfactory basis for the distribution of the property. There is moreover no indication in the deeds that either the surrender or the partition had any connection with or reference to the deeds of gift or any other document executed by Bhabadeb or that they were made on any such basis. On the other hand the intrinsic evidence of the deeds is that the property was being surrendered and partitioned, according to the position which would arise if both Karunamoyee and her sister were dead; one-fifth would be given to Mahadeb and four-fifths to the sons of Mayamoyee. That the property was divided in this proportion is further shown by the fact that the total value of the property covered by the schedules was estimated at Rs. 80,115, out of which schedule Kha, valued at Rs. 15,956 was given to Mahadeb and the balance to his cousins. We are far from being satisfied that these facts were explained to the plaintiff or that she realised that by the surrender she was losing a life interest in half of the estate left by her father.

There is a letter exhibit V (9) on which reliance was placed by the learned Subordinate Judge and by the respondents at the time of hearing in support of the contention that the plaintiff was quite aware of what she had done and of the position resulting from her action. Even assuming that it is so, we do not think that the subsequent appreciation remedies the matter or removes the defect of want of intelligent understanding at the time of execution. This would also explain the statement of the lady upon which stress was laid by Mr. Sen on behalf of the respondents that if Mahadeb had given her maintenance regularly and provided for the marriage expenses of her daughter she would not have quarrelled with the deed of surrender. We think it is quite clear that the deed of surrender was executed with a view to placate Mahadeb and exhibit V (9) was written a few days later when the plaintiff was alone with Mahadeb at Burdwan. The language used is not such as we would have expected the plaintiff to employ and we have no doubt that the major portion

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was inspired by Mahadeb. We do not think that the plaintiff had any appreciation of the necessity for registration of the deed of maintenance which had been prepared after the execution of the deed of surrender and the very fact that in the letter she writes, "My deed has not been registered nor is there any necessity for the same being registered" confirms our suspicion that the letter was not the outcome of Karunamoyee's brain; and even if the plaintiff did write in this vein we regard it as a matter of suspicion that those persons who must have realised the necessity for registration of the deed of maintenance took no steps apparently to explain the position to her or to delay the registration of the deed of surrender until the deed of maintenance was also registered. On a consideration of the evidence as a whole we are not satisfied that the deed of surrender was properly and fully explained to the plaintiff or that she really understood what its effect would be.

Even assuming for argument's sake that the plaintiff did understand the general effect of the deed, and in that sense there was intelligent execution, we have no doubt in our minds that her understanding was in the present case affected by undue influence which was exercised upon her by her son Mahadeb. The circumstances of the case clearly show that a most insidious and subtle influence was exercised upon her, which left her no will of her own. Mahadeb wanted to have the property in absolute right for satisfying his own immoral needs, and he took full advantage of the affection which a widowed mother has even for her erring son, only to serve his own purposes.

For a decision on the question of undue influence, we would rely on the observations of their Lordships of the Judicial Committee in *Mahomed Buksh v. Hosseini Bibi* (1) and the principles laid down therein.

It is said at p. 92 of the report :

"Where undue influence is alleged, it is necessary to examine very closely all the circumstances of the case. The principles are always the same, though the circumstances differ; and, as a general rule, the same questions arise". The questions as enunciated by their Lordships are :

(1) Was the transaction a righteous transaction, i. e. was it a thing which a right minded person might be expected to do?

(1) (1888) L. R. 15 L. A. 81 (92); L. R. 15 Cal. 684 (696).

(2) Was it an improvident act? That is to say does it show so much improvidence as to suggest the idea that the lady was not mistress of herself and not in a state of mind to weigh what she was doing?

(3) Was it a matter requiring a legal adviser?

(4) Did the intention of making the gift originate with the donor?

The questions may conveniently be considered together. We have already shown that during the few months that elapsed between the death of Bhabadeb and the cancellation of the Ammuktearnama executed in favour of Mahadeb, Mahadeb had incurred the displeasure of his mother and Mayamoyee and her family, and had shown his unfitness for management of Bhabadeb's estate. The evidence of both parties establishes beyond doubt that Mahadeb was a worthless and profligate son hot tempered and quarrelsome. The Ammuktearnama was apparently executed with a view to trying to reform him by developing a sense of responsibility but within a few months it was found necessary to address the letter Ex. N(1) to him and to threaten recourse to the Courts unless he rectified his ways. A short time later the Ammuktearnama was cancelled and when Mahadeb came to Calcutta he abused his mother and all concerned and threatened to assault his uncle Deben Mukherjee. He resisted all suggestion for appointment of a common manager and was not agreeable to a proposal for partition among the sisters. Such a partition would be of no advantage to him, and he was already deprived of the management of the estate by cancellation of the Ammuktearnama. What he desired intensely was to have some property which he might call his own. Up to the time when he went back to Burdwan taking his mother with him, there was absolutely no willingness or inclination on the part of the plaintiff to surrender her property or to divest herself of all interest therein. The evidence is quite sufficient to establish that the idea of a surrender did not originate with the plaintiff. She herself was not anxious to retire from the world. On the other hand, as she stated in one of her letters to Deben, she was very much in need of the properties which she got from her father, not merely for herself but for her daughters, one of whom was still to be married. Strangely however she yielded to the demands of Mahadeb as soon as she returned to Calcutta. We feel no doubt that her support of or acquiescence in Mahadeb's demands was brought about merely by the pressure and insistence to

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which she was subjected by Mahadeb, when she was left alone with him at Burdwan. It is possible that she was induced to agree to Mahadeb's demands partly out of a desire to win her son's affection and partly to the friction which Mahadeb's attitude and conduct was causing in the family, but we have no doubt that the entire basis of her agreement was the influence which Mahadeb exercised over her.

We realise that it is not the specific case of the plaintiff who in her plaint, and to some extent in her evidence sought to shelter Mahadeb and to throw the blame on Deben Mukherjee, but none the less we are satisfied that this is the truth.

As we have said above the idea of a surrender did not originate with the plaintiff. It is difficult to say that it was an act which a widow in the position of the plaintiff could be normally expected to do, and there could be no doubt that it was an improvident transaction, which she would not have done had she been a free agent in the matter. We do not think that she contemplated at any time that she would deprive herself of all means of maintenance and all claims on the property so far they might be necessary to defray her necessary expenses.

It was moreover clearly a matter requiring a legal adviser and as we have already mentioned, the only legal advice she is shown to have received prior to the surrender came from Hari Gopal who was an interested person, and whose evidence cannot be regarded as entirely satisfactory or reliable.

Our conclusion therefore is that not only was there a want of intelligent execution of the deed of surrender, but the plaintiff was also subjected to undue influence. In our opinion therefore issue No. 5 as framed by the court below should be answered in favour of the plaintiff and the deed of surrender should be set aside.

In view of this conclusion the second point raised by Mr. Choudhury is of little importance. In support of his contention that the deed of surrender is invalid because it has not been properly stamped or attested, he has relied upon the decision in *In Re. Kasturmoni Debby* (1). It was held therein that a deed executed by Hindu widow holding a limited interest in favour of the next reversioner renouncing her claim in the property and giving up possession is to be stamped as a gift under Article 33 and not as a release

(1) (1937) I. L. R. 17 Pat. 95.

under Article 35 of the Stamp Act. Mr. Sen has challenged the correctness of this decision and has referred to the discussion regarding the nature and effect of the relinquishment of her estate by a Hindu widow in *Vytla Sitanna v. Marivada* (1) and *Janaki Nath Roy v. Jyotish Chandra* (2). In the latter decision the observations of their Lordships of the Privy Council in the former decision have been quoted with approval and followed. They are:

"It must be remembered that the basis of the doctrine is the self-effacement of the widow's interest, and not the *estoppel* transfer by which such effacement is brought about. The result is merely that the next heir of the husband steps into the succession in the widow's place". Having regard to this principle, Mr. Sen has contended that by a surrender of the present nature, there is no transfer of property such as is necessary to make the transaction a gift as defined in the Transfer of Property Act. In any event, he has argued that even though it be held that the deed should be stamped as a deed of gift, it will not convert the document into a deed of gift so as to require its attestation, and the objection as to insufficiency of stamp cannot operate now to prevent its admission in evidence by reason of section 36 of the Indian Stamp Act.

We think on the whole that Mr. Sen's objection must prevail. No detailed reasons have been given in the decision, *In Re. Khairamoni Debba* (3) referred to above, and it appears that the question was not fully argued before the court. Clearly the deed of surrender does not in law or in fact purport to transfer any property. The widow merely withdraws herself from the estate and "the next heir steps into the inheritance as a matter of law, without any consent or acceptance on his part". As the Privy Council has laid down in more cases than one, the surrender by a Hindu widow need not be in any particular form. Whatever might be said in regard to case, where it takes the form of a gift, certainly it does not come within Article 33 of the Indian Stamp Act where it is in the nature of a relinquishment and not of gift.

In the present case it is not in the form of a deed of gift, and in our opinion it did not require to be stamped or attested as such.

(1) (1934) L. R. 61 I. A. 200; 38 C. W. N. 697; 59 C. L. J. 354.

(2) [1941] I. L. R. 1 Calc. 234.

(3) (1937) I. L. R. 17 Pat. 95.

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This contention of Mr. Choudhury must therefore fail.

As we have held that the deed of surrender is voidable and should be set aside the third point raised by Mr. Choudhury does not arise for consideration at all.

The only point that remains for consideration is whether the plaintiff is entitled to any relief against those defendants who are transferees of the different items of property from Mahadeb. Defendant No. 7 took a mortgage of the Burdwan house from Mahadeb and got a preliminary mortgage decree on 6th September, 1938 which was made final on 21st November, 1938. He purchased the mortgaged property in execution of his mortgage decree during the pendency of this litigation.

The defendant No. 9 purchased putni lot Barasati from Mahadeb for a consideration of Rs. 3750, while defendant No. 10 purchased another lot named Dihi Kaligram from Jogendra Pal Mayer to whom it was sold by Mahadeb. The defendant No. 11 purports to be the purchaser of premises No. 14(c) Panchu Khansama Lane. Defendants Nos. 8, 12, 13 and 14 seems to be unnecessary parties while the only point raised on behalf of defendant No. 15 in the court below seems to be that as a creditor of Mahadeb he was entitled to realise his dues for the properties obtained by the latter on the basis of the deeds of surrender and partition. He did not claim to be a transferee of any of the properties in suit. In this court for the first time it was sought to be argued on his behalf that he was a purchaser of the Saknara house belonging to Bhabadeb Chatterji and no right of residence should have been declared in favour of the plaintiff in respect of that house. This was not the point raised in the court below or in the memo of cross objection presented by him in this court. We have no materials to determine what his rights in regard to the Saknara house are, and we cannot entertain his claim at this stage or decide as to whether he is a bona fide purchaser or not. The point therefore that requires consideration is whether defendants 7, 9, 10 and 11 who are transferees of some of the properties included in the deed of surrender are or are not to be affected by setting aside of that document.

It was laid down by Lord Eldon in the well known case of *Huguenin v. Basiley* (1) that an interest obtained by undue influence cannot be held by third parties although innocent of fraud. "Whoever received the gift, must take it tainted and

infected with undue influence and imposition of the person procuring the gift, his partitioning and cantoning it out amongst his relations and friends will not purify the gift and protest it against the equity of the person imposed upon". But no equity can be enforced against a person who is a bona fide purchaser for value without notice of the imposition. Such person always receives protection from Equity Courts. In the case before us the evidence that is adduced on behalf of defendants 7, 9 and 10 seems to be sufficient to show that they took transfer of the properties on the strength of the deed of surrender and the subsequent instrument of partition. Nothing was suggested by the plaintiff in her own evidence, or in cross-examining the witnesses examined on behalf of these defendants that had any notice of the plaintiff's want of due understanding of the deed of surrender or the undue influence that was exercised on her. The transfers in favour of these persons cannot therefore be avoided. We cannot agree with the trial court in holding that the rule of estoppel operates against the plaintiff in favour of defendant No. 7, but there is no doubt that defendant No. 7 was a bona fide mortgagee who advanced money in good faith, without any notice of the impurity of the title of defendant No. 1. The defendant No. 7 however was not a purchaser but a mortgagee and he purchased the mortgaged property in execution of his mortgage decree only after present suit was instituted. We think that in these circumstances the plaintiff and defendant No. 2 cannot be deprived of their right to redeem the mortgage of defendant No. 7 on the basis of the decree that we are going to make in this suit. We would allow three months time from the date of the arrival of records in the court below to the plaintiff and defendant No. 2 to pay off the mortgage decree obtained by defendant No. 7 together with interest upto the date of the sale. If the payment is made the mortgage sale would be set aside and the defendant No. 7 would be directed to restore possession of the property purchased by him to the plaintiff and defendant No. 2. On failure to redeem the mortgage, within the time mentioned aforesaid, or within such further time as the Court below might grant, the sale would stand.

So far as defendant No. 11 is concerned, it seems that her purchase of the premises No. 14 (c) Panchu Khansama Lane was not proved in the trial court, and she could not adduce any evidence on the point. Mr. Mitter appearing in supporting her cross-objection has contended before us that owing to unavoidable circumstances her case was not presented properly in the

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Court below. He produced the document of purchase before us and prayed for an opportunity to adduce evidence to show that she was a bona fide purchaser for value without notice. We think that we should accede to his contention and as the case is going back to the trial court, this question should be investigated by the learned Sub Judge.

The result therefore is that we allow this appeal and reverse the judgment and decree of the trial court. The deed of surrender is set aside. Plaintiff's title to the properties left by her father with exception of those which have been sold under Regulation VIII of 1819, or vested in bona fide purchasers for value without notice as indicated above is declared jointly with her sister the defendant No. 2 and the court below would partition the properties between them in such way as it considers proper. The case of defendant No. 11 would also go back for reconsideration as indicated above.

The sale proceeds of Patni lot Jalkarghia that are lying with the Collector would be declared to belong jointly to the plaintiff and defendant No. 2. The plaintiff would have her costs of this Court as well as of the Court below from defendants 1 and 3 to 6. The defendants would bear their own costs of both the Courts. Defendant No. 1 and defendants 3 to 6 are also directed to pay the court-fees payable on the memorandum of appeal to this Court amounting to Rs. 1020.

Let a copy of this decree be forwarded to the Collector.

B. C. M.

Appeal allowed.

*Before Mr. Justice R. C. Mitter and Mr. Justice
A. S. M. Akram.*

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Loan—Principal of—Bengal Money Lenders Act (Act X B. C. of 1940), section 36(2) clause (a)—What is to be regarded as the principal of a loan—Adjudication between the parties fixing the amount of the principal, if can be re-opened in a proceeding for relief under section 36 of the Act—Form of decree, what it will be—Ex-parte decree, setting aside of—Decree against other defendant made final—Decision, if can be reviewed in the application by the judgment-debtor.

In a proceeding under section 36 of the Bengal Money Lenders Act, the Court has to determine what is to be the principal of the loan. That term has been defined to be the actual advance in money. Ordinarily, the principal of the loan must be taken to be what had been actually advanced but if there has been already an adjudication between the parties as to what amount represented the principal of the loan that adjudication cannot be re-opened in a proceeding for relief under section 36 of the Bengal Money Lenders Act.

The Bank of Commerce Ltd., Khulna v. Annalya Krishna Basu Ray Choudhury (1) followed.

The decree-holder brought a suit on his mortgage against the judgment-debtor and another person. This suit was decreed against the judgment-debtor and *ex-parte* against A for Rs. 4500 and it was held that the consideration money was Rs. 4500. A applied for setting aside of *ex-parte* decree and the decree was set aside as regards him. In the decree it was expressly declared that the decree against the judgment-debtor stood for Rs. 4500. The judgment-debtor allowed the decree against him made final. As the execution was pending when the Bengal Money Lenders Act, 1940 was passed, the judgment-debtor wanted that the mortgagee was only entitled to execute the decree for Rs. 262 :

Held that it was not open to the judgment-debtor in an application under section 36 of the Bengal Money Lenders Act to ask the Court to go back upon the decision in the original judgment on those issues which were found against him.

*Appeal from the Original Decree No. 135 of 1942, (with Cross-objection), against the decree of N. N. Mukherjee, Esq., Subordinate Judge of Zilla Khulna, dated the 18th March, 1942.

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The judgment-debtor was ordered to pay the decretal amount by 12 instalments.

As all the properties were purchased by the decree-holder himself the decree would be in the first form indicated in the case of *Jadu Nath Roy v. Kshitish Chandra Acharji Chowdhury* (1), that is to say, if the mortgaged properties, if not already restored to the judgment-debtor would forthwith be restored to him. In default of payment of any one instalment those properties would be restored back to the decree-holder purchaser. The judgment-debtor was further ordered to go on paying rent and cess regularly and in default the properties were to be restored back to the decree-holder purchaser.

Appeal by the Defendant.

Application for relief under section 36 of the Bengal Money Lenders Act.

The material facts will appear from the judgment.

Messrs. Gopendra Nath Das, Manindra Nath Ghosh and Hemanta Krishna Mitra for the Appellant.

Mr. Rajendra Nath Das for the Respondent.

The judgment of the Court was as follows :

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This is an appeal against a new decree passed by the learned Subordinate Judge after re-opening an earlier decree under the provisions of the Bengal Money Lenders Act. The real question in the case is what is to be regarded as the principal of the loan. For determining that question the following facts are necessary : Ashutosh Chakravarti, Satish Chandra Chakravarti and others borrowed a sum of Rs. 10500/- on a promissory note from the Bagerhat Loan Company. The said company filed a suit and obtained a decree against all the promissors, namely Ashutosh Chakravarti, Satish Chandra Chakravarti and others. The company however did not proceed to realise the decretal amount from the property of all the judgment debtors. They selected one amongst them, namely Ashutosh, the father of the plaintiff appellant Indrasekhar Chakravarti. Ashutosh satisfied the decree and thereafter brought a suit, being No. 170 of 1926 of the court of the Subordinate Judge at Khulna, for contribution against his co-judgment debtors. After filing that suit he applied for attach-

(1) (1944) 79 C. L. J. 155 ; 49 C. W. N. 30.

ment before judgment of the properties which belonged to one of the defendants of that suit, namely Satish. On the 9th November, 1926, the order for attachment was made. On the 21st February, 1927, that is to say, about two months after the order for attachment has been made Satish transferred his properties which were the subject matter of the application for attachment before judgment by two kobalas, one executed in favour of Ratikanta Haldar and the other in favour of the latter's wife, Rajubala. The conveyances are respectively Exs. A and Ar. On the 17th January, 1928, Ashutosh obtained a decree against Satish for Rs. 4136 and odd in the contribution suit No. 170 of 1926. Thereafter he filed an application to execute the decree against the properties in respect of which the order for attachment before judgment had been made and which as we have already stated had been transferred by Satish to Ratikanta and his wife Rajubala. On the 13th June, 1928, Ratikanta and Rajubala executed a mortgage in favour of Ashutosh for the sum of Rs. 4500 stipulating to pay compound interest with annual rest at the rate of Rs. 10/8/- per year. The mortgage included as security the plots of land which Ratikanta and Rajubala had purchased from Satish on the 21st February, 1927, by the kobala Exs. A and Ar. The recital in the mortgage is as follows: "You (Ashutosh), having put into execution the decree in Suit No. 170 of 1927 (1926?) of the Court of the Subordinate Judge of Khulna in which you attached the said properties before judgment, the liability of the debt of Satish Chandra Chakravarti has fallen on our shoulders. In order to make the said purchased properties free from all charges, we by making entreaties to you execute this deed of mortgage in your favour for the total sum of Rs. 4500 in lieu of the decretal amount, as we could not pay money in cash, as well as for our necessary expenses." After the execution of this mortgage Ashutosh filed an application in the execution proceeding that he had started against Satish stating that he had received a sum of Rs. 4137 and odd from Ratikanta and Rajubala and on that footing he entered up full satisfaction of that decree against Satish. The position therefore is that the consideration of the said mortgage was the payment of Rs. 262 odd in cash to Rajubala and Ratikanta and the discharge of the liability of Ashutosh's decree which was the property which they had purchased from Satish afterwards on the footing that the attachment before judgment was before their purchase from Satish. If there was in fact the attachment of

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those properties at or before the time of the purchase which Ratikanta and Rajubala had made from Satish the property would have been liable to be sold in execution of Ashutosh's decree in the contribution suit and by the sale the title which Ratikanta and Rajubala had thus obtained by their purchase would have been wiped off. That position is quite clear. If however there was in fact no attachment at or before the time when Ratikanta and Rajubala purchased the properties from Satish their title would not have been affected at all by the execution sale and in that case there would be no consideration for the sum of Rs. 423 odd. That position is clear.

In 1932, Ashutosh filed his suit (being No. 124 of 1932) on the mortgage against Ratikanta and Rajubala. Rajubala did not appear in that suit but Ratikanta did. Ratikanta's defence was that there was no consideration for the mortgage as in fact there was no attachment on the properties which he had purchased from Satish at the time of his purchase and that the mortgage was obtained by Ashutosh from him on a false representation that he had in fact attached the properties before Satish's conveyance to him. The learned Subordinate Judge framed the following amongst other issues in that suit: Did any consideration pass for the mortgage in question? (Issue No. 3). Were the lands in suit attached before judgment and are the defendants liable for the claim against Satish Chakravarti (Issue No. 4). Was the mortgage in suit taken by fraud, undue influence and misrepresentation? (Issue No. 6). He came to the conclusion that there was no fraud, undue influence or misrepresentation, that the properties had in fact been attached by Ashutosh before judgment before Satish conveyed the same to Ratikanta and his wife Rajubala. There was therefore consideration for the mortgage and the amount was what is recited in the mortgage instrument, namely Rs. 4500. He accordingly made a contested decree against Ratikanta and an ex-parte decree against Rajubala for the full amount claimed in the suit. This judgment was delivered on the 28th August, 1933 and the decree was drawn up in accordance with the judgment. Ratikanta did not file any appeal against this judgment and decree and so far as he is concerned the necessary findings which form the basis of this judgment was final. Rajubala however successfully filed an application under Order 9, rule 13, for vacating the ex-parte decree against her. The ex-parte decree as against her only was vacated and the suit as against her only was ordered to be retried. She succeeded in

the suit at the rehearing and a mortgage decree against her was passed on the footing that the consideration of the mortgage was Rs. 262 and odd. An appeal against that decree was preferred by Ashutosh's legal representative Indra Sekhar, Ashutosh having died in the meantime, and the judgment of the learned Subordinate Judge was affirmed by this court. This Court however in its judgment made it quite clear that so far as the decree against Ratikanta was concerned it would remain in tact. That decree which was made against Ratikanta by the learned Subordinate Judge on the 28th August, 1933, was put into execution by Indra Sekhar and some execution proceedings were pending on the 1st January, 1939. The mortgage suit (No. 124 of 1932) would therefore be a suit to which the Bengal Money Lenders Act of 1940 would apply. Rati Kanta made an application under section 36 of that Act for relief. As the mortgage provided for interest at a rate in excess of 8 per cent. simple and as the decree passed against him on the 28th August, 1933, had exceeded Rs. 9000 Rati Kanta was entitled to relief. Interest can only be calculated whatever may be adjudged to be the principal of the loan at the rate of 8 per cent. simple and the total amount of the decree cannot be more than double the amount of the outstanding principal. Indra Sekhar admitted in the lower court that Rati Kanta was entitled to those reliefs that is to say he admitted that the old decree which had been passed by the learned Subordinate Judge against Rati Kanta on the 28th August, 1933, will have to be re-opened and a new decree giving instalments will have to be passed on the aforesaid footing. There is no further question before us in respect of the same but the more important question is, as was the question in the lower court, as to what is to be taken to be the principal of the loan. We have already stated that in the mortgage the principal of the loan is stated to be Rs. 4500. Of this only Rs. 262 odd was actually advanced in cash by Ashutosh to the mortgagors and the rest represented the dues of Ashutosh under the decree which he had obtained in the contribution suit against Satish and which was paid to Ashutosh by the mortgagors on the footing that the properties in their hands which they had purchased from Satish would have been liable for the decree which Ashutosh had obtained against Satish on the ground that their purchase was effected after the attachment before judgment of those properties had been made by Ashutosh. The learned Subordinate Judge has held that inasmuch as in the proceedings started by Rajubala it was finally

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held that there was in fact no attachment at the date when Rati Kanta and Rajubala purchased the properties from Satish the real and effective consideration of the mortgage would be only Rs. 262. He has taken that to be the principal of the loan and has made his decree accordingly. We do not think that the learned Subordinate Judge is right.

We will have to consider the effect of the judgment which was delivered by the learned Subordinate Judge on the 28th August, 1933. That judgment is the final judgment as against Rati Kanta, because Ratikanta did not prefer any appeal. Moreover in the proceedings which had been started at the instance of Rajubala it was expressly stated that that judgment and the decree of the learned Subordinate Judge so far as it was against Ratikanta, would stand. We have already stated that one of the issues which Ratikanta raised in the mortgage suit was whether Ashutosh had in fact attached the properties which he had purchased from Satish before his purchase. The learned Subordinate Judge held rightly or wrongly that it was in fact attached before his purchase from Satish. He further held that the mortgage was for consideration and the amount of the consideration was Rs. 4500. The question is whether those findings can be re-opened in the proceedings started on an application under section 36 of the Bengal Money Lenders Act. The case before us is not the case of a renewed bond but of an original bond. In a proceeding under section 36 the court has to determine what is to be the principal of the loan. That term has been defined to be the actual advance in money. Ordinarily, the principal of the loan must be taken to be what had been actually advanced but in our judgment if there has been already an adjudication between the parties as to what amount represented the principal of the loan that adjudication cannot be re-opened in a proceeding for relief under section 36 of the Bengal Money Lenders Act. In the case of *The Bank of Commerce Ltd. Khulna v. Anubha Krishna Basu Roy Choudhury* (1), the Federal Court defined the scope of section 36(a) of the Bengal Money Lenders Act. We quote the relevant observation which is as follows: "We do not understand section 36(a) as relegating the parties to their rights and liabilities on the original cause of action. The decree is re-opened only to the extent necessary to substitute the method of account-taking sanctioned by the Act in place of the calculation on which the original decree was passed". The case before the

(1) [1944] 6 F. C. R. 126; (1944) 79 C. L. J. 220 (228).

Federal Court no doubt was of a different type. There a decree on a promissory note had been obtained. The question was whether that decree could be re-opened under the provisions of the Bengal Money Lenders Act. The argument of the decree holder, the Bank of Commerce Ltd., was that the provisions of section 36 of the Bengal Money Lenders Act was *ultra vires* of the Bengal Legislature so far as promissory notes were concerned and therefore those provisions could not be invoked for the purpose of re-opening a decree *passed on promissory note*. The Federal Court in that case left the question open as to whether the Provincial Legislature could legislate on negotiable instruments, that is, on promissory notes and negotiable instruments of other kinds, but they held that the promissory note had been merged in the decree and so had no separate existence at the time when the application for relief under section 36 of the Bengal Money Lenders Act had been filed. In repelling one of the arguments of the learned Counsel who was appearing for the Bank of Commerce those observations were made by the Federal Court. Those observations are, in our judgment, material for they define the scope of section 36(2)(a) of the Bengal Money Lenders Act.

Two cases decided by this Court after that decision of the Federal Court would throw some light on the question that we have to determine, namely whether in an application under section 36 of the Bengal Money Lenders Act it is open to the judgment debtor to ask the court to go back upon the decision in the original judgment on issues Nos. 3, 4 and 6, which we have set out at some length in the earlier part of our judgment. The cases are *Sambhu Charan Dey v. Hrishikesh Dey* (1) and *S. K. Ajaraddi v. Sm. Senai Bibi* (2). There mortgage suits were instituted and decided before the Bengal Money Lenders Act came into force. The mortgagors pleaded that before the suit they had made some payments. That plea was overruled and the decrees were made. Those decrees, which we will designate as the original decrees were under execution on the 1st January, 1939, and so to the suits the Bengal Money Lenders Act, 1940, was attracted. The debtors made an application under section 36 for re-opening the original decrees. The question was whether in the proceedings started on that application under section 36 by the debtors for relief the question as to whether those payments had been made and which had been overruled by the

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(1) (1944) 49 C. W. N. 367.

(2) (1945) 49 C. W. N. 638.

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judgment on the basis of which the original decrees were passed could be reconsidered. Relying on the aforesaid passage of the Federal Court's judgment in the *Bank of Commerce* case (1) it was held that the Court was not entitled to do so. The adjudication on the question of payment as made in the original judgment was held to be final between the parties. Another illustration would be more pertinent. Suppose a person borrows a sum of Rs. 5000 on mortgage and the mortgage bond states that the amount of the loan advanced was Rs. 5000. Later on when the mortgagee institutes his suit on the mortgage the mortgagor takes the plea that Rs. 5000 had not been advanced by way of loan but only Rs. 4000, the remaining Rs. 1000 not being paid to him at all but had been retained by the mortgagee. An issue is framed on that point. The parties lead evidence. The court disbelieves that plea of the mortgagor and comes to the conclusion that Rs. 5000 had in fact been advanced at the time of the mortgage. That is the original judgment and on the basis of that original judgment the decree follows. Later on the mortgagor makes an application under section 36 of the Bengal Money Lenders Act for re-opening the decree and the decree is liable to be re-opened on other grounds. In that proceeding for relief under section 36 he raises the self-same question in another form by saying that as Rs. 4000 was the actual advance that sum and not Rs. 5000, the amount which was stated in the mortgage bond, ought to be taken as the principal for the purposes of making calculation, in terms of section 30 of the Bengal Money Lenders Act. If he was allowed under that garb to have the question re-opened and re-agitated it would be relegating the parties to their rights and liabilities on the original cause of action, and this the Federal Court has said cannot be done. Whether there was consideration for the mortgage bond so far as Rati Kanta was concerned and what was the amount of the consideration are questions which have been made conclusive by reason of the findings of the learned Subordinate Judge in the original judgment which he delivered on the 28th August, 1933. As the case before us is not the case of a renewed bond but of an original bond the principal of the loan must be taken to be what was found to be the amount of the consideration by the learned Subordinate Judge in that judgment. The result of the proceedings taken at the instance of Rajubala has no bearing on the question. If the decision of the issues relating to the ques-

(1) [1944] 6 F. C. R. 126; (1944) 79 C. L. J. 320.

tion of the consideration and its amount as given by the learned Subordinate Judge on the 28th August, 1933, could have in law been re-opened then and then those proceedings may have been relevant for the purpose of considering the question as to whether in fact there was attachment before Satish had sold his properties to Rati Kanta.

The result is that differing with the learned Subordinate Judge we hold that Rs. 4500 should be taken to be the principal of the loan. If interest is calculated from the date of the mortgage at the rate of eight per cent. simple it would far exceed double that amount. The new decree must therefore be for double that amount namely Rs. 9000. To that must be added the cost that was decreed in the decree of the 28th August, 1933.

The next question is a question of instalments. Both parties led evidence bearing upon the point. It appears to us that Rati Kanta tried to minimise his resources and Indra Sekhar to exaggerate the resources of Rati Kanta. Rati Kanta stated that he would be able to pay if 20 yearly instalments were allowed, whereas Indra Sekhar said that he would be able to pay up in five yearly instalments. After giving the matter our best consideration we think that the amount should be paid in 12 (twelve) equal annual instalments the first of such instalments is to be paid by Chaitra 1353 B. S. and the remaining instalments within Chaitra of each succeeding year. As all the properties which had been mortgaged by Rati Kanta had been purchased by the decree holder himself the decree would be in the first form indicated in the case of *Jadu Nath Ray v. Kshitish Chandra Acharya Chowdhury* (1), that is to say, the mortgaged properties, if not already restored to Rati Kanta would forthwith be restored to him. In default of payment of any one instalments those properties would be restored back to the decree holder purchaser. We impose a further condition upon Rati Kanta namely that he must go on paying rent and cess regularly and in proof of payment file the chalangis in the lower court a week before they are due. In default the properties are to be restored back to the decree holder purchaser. The arrears must be paid before the first instalment becomes due and the default clause would also attach in the case of non-payment of the arrears.

The cross objection is dismissed but without costs.

A. T. M.

Appeal allowed : Cross-objection dismissed.

(1) (1940) 79 C. L. J. 155 ; 49 C. W. N. 30.

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Before Mr. Justice P. Chakravarti.

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January, 10, 15.
March, 11.

MAHARAJA SASHI KANTA ACHARJYA BAHADUR,¹

AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES :

MAHARAJA KUMAR SITANGSHU

KANTA ACHARJYA BAHADUR

AND OTHERS

9.

JAGANNATH NAMADAS AND OTHERS.*

Possession, suit for—Code of Civil Procedure (Act V of 1908), Order 41 rule 27—Additional evidence, when admissible—Purchase of tenancy by decree-holder in execution of decree passed in rent suit against all but one of the holders—No act of possession exercised—Suit by purchaser for declaration and possession—Review, on discovery of fresh evidence that the alleged left-out holder had no interest, refused by appellate Court—Court, in second appeal, if has jurisdiction to entertain an application for admission of such additional evidence—Decree passed in the said rent suit, if a rent decree.

Additional evidence could be admitted only when the appellate Court itself required it and the evidence now produced by the plaintiff is clearly evidence of that explanatory character.

On the rejection of the application for review the decree as passed by that Court remained as it was and when that decree came to be dealt with by High Court in second appeal it is impossible to say that an application for admission of additional evidence would not lie as a matter of law, because such an application, made in the form of an application for review, had been rejected by the lower appellate Court and the Court in second appeal has jurisdiction to entertain such application.

On consideration of the additional evidence it must be held that the decree obtained by the plaintiff appellant was a rent decree.

Appeal by the Plaintiffs.

Suit for declaration of title and for delivery of possession.

The material facts appear from the judgment.

Messrs. Ramaprasad Mookerjee and Nagendra Nath Bose for the Appellant.

Mr. Jyotsna Sanhar Bhaduri for the Respondents.

C. A. V.

*Appeal from Appellate Decree No. 1626 of 1942, against the decree of Priya Nath Sen, Esq., Subordinate Judge, 4th Court, Mymensingh, dated the 12th of May, 1942, modifying the decree of Arun Kumar Das, Esq., Munsiff, 3rd Court, Sadar Mymensingh, dated the 14th of February, 1942.

The following judgment was delivered :

Chakravartti, J. :—This appeal is on behalf of the plaintiff and arises out of a suit for declaration of title to and recovery of possession from the defendants on their eviction from an area of 85 acres of land (Dag No. 30) in mouza Akua. The plaintiff's case was that the land was part of a tenancy originally held by certain persons called the Sens and that in execution of a rent decree obtained against the Sens in 1930, the plaintiff had purchased the land of the said tenancy on the 19th March, 1930. He obtained possession on the 24th February, 1932. He did not however exercise any act of actual possession. Sometime later he received notice of certain transfers by defendants Nos. 1 to 3 of portions of this land and then he discovered that those defendants were upon the land without, as he alleged, any right or title thereto. On the above allegation he asked for a declaration of his title as the purchaser at the rent sale and eviction of the defendants on the footing that they were trespassers.

The defence, so far as is material to the present case, was that the right in which the Sens held the land was the right of tenure-holders and that the defendants were raiyats under the Sens. A further defence was that the decree which the plaintiff had obtained against the Sens was not a rent decree at all, by reason of the fact that certain of the tenants interested in the tenancy had not been impleaded in the rent suit. It was therefore pleaded in the written statement that the plaintiff had not, by his execution purchase, obtained the rights of a purchaser at a rent sale.

The trial Court passed a limited decree in favour of the plaintiff. It held that the decree in execution of which the plaintiff had purchased the lands was not a rent decree but a money decree and the interest of one Mrinalini, which was one-sixth, had not been affected thereby. On that finding the learned Munsif declared the title of the plaintiff to the extent of the shares of the persons who were judgment debtors under the decree which he had obtained, namely 5/6ths. The claim for recovery of possession was dismissed.

On appeal the lower appellate court modified the decree passed by the trial court to the extent that it merely declared the plaintiff title by purchase without specification of either the nature of his title or its extent. It added a rider to the effect that the plaintiff would be able to recover a fair and equitable rent from the defendants to the extent of his interest. Subject to this modification, the appeal was dismissed.

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It is necessary now to state, in little more detail, the actual findings arrived at by the courts below. They found concurrently that in respect of the suit land the Sens were not tenure-holders but raiyats; that the defendants had not proved that they had obtained any settlement of the land from the Sens; that nevertheless the defendants had been in possession from the time of their grandfather under a claim of tenancy under the Sens and thus acquired by adverse possession the rights of kofa tenants before the plaintiffs' purchase at the rent sale; that such a tenancy was an incumbrance under the law and required to be annulled; that in those circumstances there could be no question of the plaintiff being given a decree for possession, inasmuch as the defendants were not trespassers and secondly inasmuch as no proper notice, annulling the incumbrance, had been served under section 167 of the Bengal Tenancy Act. Both the courts pointed out that a notice, purporting to be notice under section 167, had been filed only on the date of the trial but that date was clearly more than one year after the confirmation of the sale and the plaintiff had not proved that it was within one year from the date of his knowledge. The Courts pointed out further that service of this notice upon the defendants had been proved and also that no foundation had been laid in the plaint for ejectment of the defendants on the footing that the incumbrance held by them had been duly annulled. On these findings the courts below arrived at the conclusions to which reference has already been made.

It is next necessary to refer to a chapter of events upon which the argument before this Court mainly turned. It appears that the only evidence led at the trial in support of the contention that one of the tenants had been left out in the rent suit was the evidence coming from two witnesses. One of them, who was defendant No. 1 in the suit, stated that Mrinalini was also one of the maliks and that he had seen her in the house of the Sens five or six years before. The other witness was a pleader whose mother held a mortgage of the suit lands and he stated that Mrinalini was also one of the co-sharers.

The decision of the trial court was given on the 14th February, 1942. On the 10th March, 1942, an application was made before the trial court for review of judgment on, amongst others, the ground that the plaintiff had discovered after the judgment that Mrinalini's husband had predeceased her father-in-law and therefore Mrinalini was not and could never have been one of the

co-sharer tenants. On the 16th March, 1942, the appeal before the lower appellate court was filed. It appears that no application for reception of any additional evidence was made before that court and the appeal came to be disposed of on the 12th May, 1942. On the 10th August, 1942, however, an application for review of judgment was filed before the lower appellate court on, amongst others, the ground already stated and it was there asserted that the applicant had then for the first time been able to procure the relevant documentary evidence, namely a copy of a death register and a copy of a suit register which would prove his contention that Mrinalini was not one of the co-sharer tenants. After this application for review had been filed before the lower appellate court, the appeal to this Court was presented on the 18th August, 1942. Previously, however, on the 15th August the appellant had informed the trial court that he would not proceed with the application for review which was pending before that court. The review application filed before the lower appellate court came ultimately to be disposed of on the 18th December, 1942, and it was dismissed on something like a preliminary ground. The learned Judge held that even if the two items of additional evidence were received and a finding recorded thereon that Mrinalini had not been one of the co-sharers and consequently the decree obtained by the plaintiff was a rent decree, still the result would not be in any way different, since the defendants were not trespassers as alleged in the plaint but were incumbancers and no proper steps for annulling the incumbrance had been taken nor had the plaint been amended so as to ask for ejectment on the latter footing. In this view the lower appellate court dismissed the application for review *in limine*.

The appeal to this Court came to be heard on the 10th January, 1946, but after I had dictated the judgment and before it was transcribed, it appeared that this matter required further consideration. Accordingly the appeal was set down for further hearing and meanwhile the appellant has made an application to this Court for reception of the aforesaid two items of additional evidence after notice to the respondent which he received on the 3rd February, 1946.

I may point out at once that on merits the lower appellate Court, in dealing with the application for review, was not justified in holding that to allow it would serve no practical purpose. It might be true that the plaintiff would not be able to obtain a decree for possession but he had also sued for declaration

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of his title and surely the two items of evidence had a clear bearing on the question as to whether he had purchased the interest of all the tenants or of only some of them. The learned Judge therefore was not, in my view, right in throwing out the application on the ground that he did, but I must hasten to add that he having refused the application for review after disposal of the appeal before him, I have no justification in second appeal to set aside the order.

The question is whether I have jurisdiction in second appeal to entertain the application which has been made, apart from its merits. In my view I have such jurisdiction. The ground upon which the lower appellate court threw out the application for review has already been stated. On the rejecting of the application the decree as passed by that court remained as it was and when that decree came to be dealt with by this Court in second appeal it is impossible to say that an application for admission of additional evidence would not lie as a matter of law, because such an application, made in the form of an application for review, had been rejected by the lower appellate court. The question before me simply is whether the appellant has been able to bring himself within the limits of Order 41, rule 27 Civil Procedure Code.

Mr. Bhaduri, appearing for the respondent, has referred me to all relevant cases decided either by this Court or by the Privy Council. All the law stands explained by the latest of them. It is now well settled that an appellate court cannot admit additional evidence unless the court itself requires such evidence in order to be able to pronounce judgment. There were certain observations to the contrary effect in the case of *Indrajit Pratap Saki v. Amar Singh* (1), where it might be taken to have been observed that the powers of the appellate Court were not limited to cases where a lacuna or defect in the evidence had been discovered. That decision however has subsequently been explained in the case of *Parsetim Thakur v. Lal Mohan* (2), which has laid down with some emphasis that the true rule was as laid down in that decision, namely that additional evidence could be admitted only when the appellate court itself required it.

Applying that test to the present case, it seems to me that the case comes clearly within the limits of the rule laid down by the Judicial Committee. The evidence bearing upon the alleged

(1) (1923) L. R. 50 I. A. 183; I. L. R. 2 Pat 676; 39 C. L. J. 218.

(2) (1931) L. R. 58 I. A. 254; 35 C. W. N. 786; 54 C. L. J. 1.

interest of Mrinalini has already been referred to. She could not have been a necessary party to the rent suit and her absence could not deprive the decree of the character of a rent decree simply because she had been in the house of the Sene five or six years ago or simply because in 1942 or 1943 somebody said in a general way that she was also one of the co-sharers. The matter for enquiry was whether she had any interest in the tenancy at the time when the rent suit was brought, namely in the year 1930. The vague statement that Mrinalini was also one of the co-sharers, coming, in one case, from a tenant and in another case from a mortgagee does require, in my view, to be clarified or supplemented by other evidence. The evidence now produced by the plaintiff is clearly evidence of that explanatory character.

I am satisfied from the averments in the affidavit supporting the application that it was beyond the power of the plaintiff to produce this evidence at any previous stage. Mr. Bhaduri complained that the appellant ought to have prayed for an adjournment of the appeal before the lower appellate court. That, I do not think, is a very reasonable criticism, seeing that before the disposal of the appeal by the lower appellate court the plaintiff had been unable to obtain these pieces of evidence. The evidence proves that in the year 1917 Mrinalini was describing herself as the widow of Jadunath but Krishna Sundar Sen, the father of Jadunath, died on the 31st December, 1922. Clearly therefore Mrinalini being the widow of a predeceased son was not, as the law stood in 1930, one of the heirs or one of the co-sharers interested in the tenancy.

On this evidence I am bound to hold that the decree obtained by the plaintiff appellant was a rent decree. Even without this evidence I would be bound to hold that the evidence led by the defendants had not proved in a manner sufficient in law that Mrinalini was in fact one of the co-sharers. In either case, the finding of the courts below on this point cannot be supported and must be set aside.

I am of opinion, however, that the courts below are entirely right in holding that the plaintiff could not obtain a decree for khas possession either on the basis that the defendants were trespassers or on the basis that a notice for annulment of the incumbrance had been duly served. His claim to eject the defendants on either of these grounds must be rejected and will stand dismissed. He will however get a declaration of his superior title

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as the purchaser at the rent sale to the entire 16 annas of the tenancy.

The result is that the appeal is allowed in part. The judgments and decree of both the courts below are modified to the extent that the plaintiff's title, as the purchaser at the rent sale, to the full sixteen annas of the lands of the tenancy is declared but his claim for recovery of possession is dismissed. In view of the application which has certainly occurred towards the later stages of the proceedings on the part of the appellant, I order that each party will bear its own costs throughout.

The copies of the death register and the suit register, put in along with the application filed in Court to day, are accepted in evidence and will form part of the record.

Leave to appeal under clause 15 of the Letters Patent has been asked for. It is refused.

Appeal allowed in part.

*Before Sir Rupendra Coomar Mitter, Knight, Acting
Chief Justice, and Mr. Justice K. C. Chunder.*

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Damages—Fatal Accidents Act (XIII of 1855), sections 1, 2—Negligence—Performance of statutory duty—Liability for negligence, when arises—Contributory negligence—Test—Suit under Fatal Accidents Act—Who can bring—Plaint—One of the beneficiaries not joining in the suit—Damages, how calculated.

In the case of a public authority exercising statutory powers, there may or may not exist a duty to take care in favour of particular individuals. When such a duty exists, an individual who is injured by negligence in the performance of such a statutory duty has a right of action in respect of that negligence unless the statute expressly or impliedly excludes such liability.

The Fatal Accidents Act gives a right to the executor, administrator or representative of the person deceased to bring an action or suit, provided the death of the person was caused by wrongful act, neglect or default, which was as would have entitled the party injured to maintain an action and recover damages.

* Appeal from Original Decree No. 139 of 1943, with cross-objections, against the decree of Tofail Ali Khondkar, Esq., Subordinate Judge, 2nd Court of Dacca, dated the 24th August, 1942.

A plaint in a suit under the Fatal Accidents Act should not be carelessly drawn and should mention all the persons for whose benefit the suit has been brought and must further state the nature of the claim in respect of which damage is sought to be recovered.

Ordinarily there is no liability for negligence unless there is in the particular case a legal duty to take care; *Thomas v. Quartermaine* (1). There must be an existence of legal duty to take care and secondly, the degree or amount of care which is obligatory. There are cases in which absolute liability has been imposed by law, namely, those who come within the rule in *Fletcher v. Rylands* (2) and *John Rylands v. Thomas Fletcher* (3).

Ordinarily, in case of contributory negligence, there is negligence on both sides. The real test is whether any party could reasonably have avoided the consequences for the other party's negligence.

Knowledge of an existing danger or negligence is a very important element in determining whether or not a person is guilty of contributory negligence.

Under the Fatal Accidents Act, the right of action is not given to a certain class of persons. These are the executor, or administrator, or representative of the deceased. Representative has been explained as meaning not the legal representative but the wife, husband, parent or children. The right of action is not given merely to the relative as a class but to the individuals comprised in the class: *Pym v. Great Northern Railway Company* (4); *Fekussen v. The Madras Railway Company* (5); *Nani Bala Sen v. Auckland Yule Company, Limited* (6) and *E. V. Penheto v. M. Minney* (7).

Under the Fatal Accidents Act, the suit must be brought for the benefit of the wife, husband, parent and children. Any one of person entitled to sue can bring the suit, but the suit must be brought for the benefit of these four specified class of person.

As regards calculation as to damages the Fatal Accidents Act lays down in section 1 that a right has been given to ask for damages proportionate to the loss resulting from such death to the parties claiming such damages, that is, reparation for the loss caused to the beneficiaries mentioned in the Act. There must be a pecuniary loss sustained by the person claiming either actual or expected. Such pecuniary loss is evidenced by proof of a reasonable expectation of pecuniary benefit. There must be a certain amount of guess work in estimating such expectation, as various factors have to be considered which cannot be expressed arithmetically. At the same time sympathetic damages or solatium for loss of companionship are not relevant. The main criterion is the loss of reasonably expected pecuniary benefit. At the same time the probable earnings and future prospects of the deceased himself are to be taken into consideration, because the extent to which a person can benefit others depends largely on his earning capacity.

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(1) (1897) 18 Q. B. D. 685 (694).

(2) (1866) L. R. 1 Ex. 265.

(3) (1868) L. R. 3 H. L. 330.

(4) (1863) B. & S. 356.

(5) (1905) I. L. R. 28 Mad. 479.

(6) (1925) I. L. R. 52 Cal. 602.

(7) (1934) I. L. R. 61 Cal. 480; 39 C. L. J. 221.

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Generally and ordinarily, it is required under the Fatal Accidents Act that the share of each of the beneficiaries should be apportioned.

Under section 2 of the Fatal Accidents Act a suit can be brought for and recovery of damages for loss to estate.

A suit for damages under the Fatal Accidents Act was brought by the widow, two minor sons and a minor daughter of the deceased against the respondent, the Chittagong Engineering and Electric Supply Company, Limited. The father, though alive, did not join in the suit.

It was found as a fact that the deceased took his bath at the pipe water hydrant at Sim Road and when his body was wet he was coming back to the cloth shop of his father, where he worked as his father's assistant. This shop adjoined the Road and there was a drain in between and a Veranda or raised platform next to it. An electric wire comes down to the ground from the pole and this has to be a dead wire, that is, a wire without current in it. Unfortunately this wire was a live wire. The deceased was taking a short cut and as he was carrying a vessel containing water, he put his hand on the electric wire for support when getting upon the platform and was instantly killed. It was also found as a fact that there was negligence on the part of the defendant.

Held, that mere absence of negligence on the part of the deceased would not be sufficient to justify want of contributory negligence.

There was no contributory negligence on the part of the deceased by touching the wire, when his body was wet, as he was not doing anything which a person exercising reasonable care would not have done, and as he was not at all aware of any danger existing as a consequence of the defendant company's negligence.

That there was no ground for dismissing the claim for non-joinder of father.

Rivers Steam Navigation Company, Limited v. Sm. Khania Kumari Banik (1) and *Rivers Steam Navigation Company, Limited v. Hirulal De* (2) explained.

As a special case the Court did not make any separate apportionment for the beneficiaries.

Appeal by the Plaintiffs and Cross-objections by the Defendant Company.

Suit for damages.

The material facts appear from the judgment.

Messrs Jatindra Nath Lakiri and Sibakali Bagchi (for *Bepin Chandra Basu*) for the Appellants.

Mr. Sukhir Chandra Masumdar for the Respondents.

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(1) (1934) 59 C. L. J. 391; 38 C. W. N. 531.

(2) (1934) 59 C. L. J. 394; 38 C. W. N. 553.

The following judgments were delivered :

Chunder, J. :—Harinandan Poddar was killed by electric shock on the 1st July, 1939, at Sim Road, Narayangunge. A suit was filed for damages under the Fatal Accidents Act by the widow, two minor sons and a minor daughter of the deceased against the respondent, the Chittagong Engineering and Electric Supply Co. Ltd., and another, with whom we have no concern in this appeal, as the claim against him was dismissed and no appeal filed against the order of dismissal. The claim was decreed for Rs. 1,500 and costs of Rs. 47-7-6 pias and Rs. 1,110 was ordered to be paid as court-fees by the plaintiffs to the Government, as the plaintiffs had filed the suit as paupers. The appeal relates to the amount of damages and there is a cross-objection by the defendant respondent against the findings and order of the learned Subordinate Judge. We shall take up the cross-objection first.

The Subordinate Judge, and court, Dacca, found that for this death there was actionable negligence on the part of the defendant company. The pole fuse at pole No. 43, from which connection had been taken, was defective. He found also that the higher resisting power of the earthwire used made it incapable of immediate discharge of electricity into the earth; and the third and the most important factor found by the learned Subordinate Judge was that an insulation bush at the open end of the G. I. pipe, which prevents the destruction of the insulation in the V. I. R. cables inside the pipe was absent. The learned Subordinate Judge held that there was negligence on the part of the defendant company. The evidence given by Mr. Meyer, the Electric Inspector to the Government of Bengal, was accepted by the Court below, and on that evidence, the findings arrived at by the learned Subordinate Judge were correct. At the hearing of the appeal, the learned Subordinate Judge's findings on this point have not been contested. It is now accepted that there was negligence on the part of the defendant company.

The learned Subordinate Judge has also found that in the present case there is an individual right of action. The law on the point is quite clear. In the case of a public authority exercising statutory powers, there may or may not exist a duty to take care in favour of particular individuals. Where such a duty exists, an individual who is injured by negligence in the performance of such a statutory duty has a right of action, in respect of that negligence unless the statute expressly or impliedly excludes such liability. In the present case it was not contested

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at the hearing of the appeal that there was such a duty to take care and right of individual action was not expressly or impliedly excluded by the statute.

The fatal Accidents Act gives a right to the executor, administrator or representative of the person deceased to bring an action or suit, provided the death of the person was caused by wrongful act, neglect or default, which was as would have entitled the party injured to maintain an action and recover damages had he been alive.

In the present case, as there was actionable negligence on the part of the company, it was held that there was a right to sue under the Fatal Accidents Act.

The defence mainly was that there was contributory negligence on the part of the deceased.

The first point raised in the cross-objection relates to the question of contributory negligence. The facts as disclosed by the evidence are that the deceased took his bath at the pipe water hydrant at Sim Road and when his body was wet he was coming back to the cloth shop of his father, where he worked as his father's assistant. This shop adjoins the road and there is a drain in between and a veranda or raised platform next to it. An electric wire comes down to the ground from the pole and this has to be a dead wire; that is, a wire without current in it. Unfortunately for the deceased, owing to the negligence of the defendant company mentioned before, this wire was a live wire. The deceased was taking a short cut and as he was carrying a vessel containing water, he put his hand on the electric wire for support when getting upon the platform and was instantaneously killed. These facts are found also by the learned Subordinate Judge and have not been challenged at the hearing of the appeal.

The learned Subordinate Judge's judgment is not very clear as to the reason why he considered that in law there was no contributory negligence on the part of the deceased. We, therefore, think it necessary to state the legal principles as far as applicable to the appeal before us.

It is now a firmly established principle that ordinarily there is no liability for negligence unless there is in the particular case a legal duty to take care. In *Thomas v. Quartermaine* (1), Lord Justice Bowen said :

(1) (1887) 18 Q. B. D. 685 (694).

".....the ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise towards somebody."

Where there is no duty to exercise care at all, negligence in the popular sense has no legal consequences. Two things have to be kept distinct: first, there must be the existence of such a legal duty to take care; and secondly, the degree or amount of care which is obligatory.

There are cases in which absolute liability has been imposed by law, namely, those who come within the rule in *Fletcher v. Rylands* (1) and *John Rylands v. Thomas Fletcher* (2). Had the learned Subordinate Judge not found negligence on the part of the company in the present case, it would have been necessary for us to discuss this at length, as the rule in *Rylands v. Fletcher* (2) has been applied in case of chemicals, fire and electricity.

It is not clear from the learned Subordinate Judge's judgment whether he considered there was no negligence at all on the part of the deceased, and, therefore, there was no contributory negligence. Mr. Majumdar, appearing for the respondent company, wanted to make out that the facts that the deceased was wet of body, that he took a short cut, or that he put his hands against the wire in support, should be taken as acts of negligence. We are unable to consider this argument as deserving of serious notice. There is no duty on the part of any person that he should go about always with a dry body, or that he should not take a short cut for convenience, or that he should not put his hand against something for support. We do not find any negligence on the part of the deceased for these acts.

Even such a great authority as Sir John Salmond had taken the view that a plaintiff, in order to be defeated by the defence of contributory negligence, must be under a legal duty to take care for his own safety, but since the decision of Lord Parmoor in *Grayson, Limited v. Ellerman Line, Limited* (3), agreeing with the law as propounded by Atkin, L. J. in the Court below, in *Ellerman Line*,

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(2) (1868) L. R. 3 H. L. 330.

(3) (1920) A. C. 477.

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Limited v. Grayson, Limited (1), there is now very little doubt that Sir John Salmond's opinion has to be considerably modified. Lord Parmoor said :

"I do not think that the question of contributory negligence depends upon any breach of duty as between the plaintiff and the negligent defendant ; it depends entirely on the question whether the plaintiff could reasonably have avoided the consequences of the defendant's negligence."

Ordinarily, in case of contributory negligence, there is negligence on both sides ; but as has been pointed out in the passage just quoted, the real test is whether one party could reasonably have avoided the consequences for the other party's negligence. Therefore, in the present case, even mere absence of negligence on the part of the deceased would not be sufficient to justify want of contributory negligence.

The rule in *Davies v. Mann* (2), approved and applied by the House of Lords in *Radley v. London and North Western Railway Company* (3), seemed to lay down as universal rule that the true test in cases of contributory negligence is the existence of the last opportunity of avoiding the accident. The decision of the Judicial Committee of the Privy Council, however, in *British Columbia Electric Company v. Loach* (4) shows that this rule, although an approximation to the truth, is not complete and adequate statement of it. This decision of the Judicial Committee has been approved of and accepted in other subsequent decisions.

It is unnecessary for us to enter into the question of qualifications of the rule in *Davies v. Mann* (2).

It was urged by Mr. Majumder that in spite of the livewire, as a result of the negligence of the defendant company, if the deceased had not put his hand on the same, the accident could have been avoided, and so there was contributory negligence.

This contention is not sound in law. It was pointed out in *Lax v. Darlington Corporation* (5), per Bramwell, L. J. at page 36, explaining *Clayards v. Dethick and Davies* (6), that knowledge by

(1) (1919) 2 K. B. 535.

(2) (1842) 10 M. & W. 546.

(3) (1876) 1 A. C. 734.

(4) (1916) 1 A. C. 719.

(5) (1879) 5 Ex. D. 28 C. A.

(6) (1848) 12 K. B. 439.

the plaintiff of an existing danger, or of the defendant's negligence, is a very important element in determining whether or not he has been guilty of contributory negligence. In the present case, no one can even faintly suggest that the deceased was, or could reasonably have been expected at all to be aware of any danger existing from a livewire as a result of the defendant's negligence. Under the circumstances, even though the deceased, by not touching the wire, when his body was wet and therefore a greater conductor of electricity, could have avoided the accident, we cannot consider that there was any contributory negligence on his part by doing so, as he was not doing anything which a person exercising reasonable care would not have done, and as he was not at all aware of any danger existing as a consequence of the defendant company's negligence.

The point of contributory negligence urged at the hearing of the cross-objection must, therefore, fail.

Although there are as many as 26 grounds mentioned in the memorandum of cross-objection, only one other point was urged at the hearing of the cross-objection.

We have already mentioned that the suit was instituted by the widow and the children. It appears that the father of the deceased was also alive. It was urged by Mr. Majumdar that as the father did not join in the suit, the suit was not maintainable. The Fatal Accidents Act says :

"Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator, or representative of the person deceased ; and in every such action, the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought ; and the amount so recovered after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct."

In all cases of fatal accidents, two things have to be kept separate, namely, first, only a certain limited class of person have right to bring the suit. These are the executor, or administrator, or representative of the deceased. Representative, in several decisions, has been explained as meaning not the legal representative but the wife, husband, parent or children. In the present case, the suit has

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been instituted by the wife and the children. It was pointed out in *Pym v. Great Northern Railway Company* (1), under the English Fatal Accidents Act, that the right of action is not given merely to the relatives as a class but to the individuals comprised in that class.

This decision was followed, as far back as 1905, in *Johnson v. The Madras Railway Company* (2), and that decision of the Madras High Court has been accepted as correct by Page, J. sitting singly in the Original Side of this High Court in *Nani Bala Sen v. Auckland Jute Company, Limited* (3), and by Roy, J. also sitting singly in the Original Side of this High Court in *Esther Virginia Penheiro v. Maurice Minney* (4). In our opinion, the right of action belongs to any one of the person, namely, the executor, or the administrator, or the representative, that is, the wife or husband or parent or child. Any one of them can bring the suit for the benefit of the others. There is, therefore, no defect in the present case, because the father had not joined as a plaintiff.

The second requisite in a suit under the Fatal Accidents Act is that it must be brought for the benefit of the wife, husband, parent and children. They are the beneficiaries. Any one of the person entitled to sue can bring the suit, but the suit must be brought for the benefit of these four specified class of person. The true value of the objection of Mr. Majumdar as it appears to us, is not that the suit was brought by any wrong person, or not by all the persons entitled to bring the suit, but that in the suit among the beneficiaries the father was not mentioned. The decisions cited by him, namely, *Rivers Steam Navigation Company, Limited v. Sm. Khanta Kumari Banik* (5), and *Rivers Steam Navigation Company, Limited v. Hirulal De* (6), both decisions of Mallik and Patterson, JJ. in the Civil Revisional Jurisdiction, of this High Court, relate to this defect and not to the right to sue in a case under the Fatal Accidents Act. In both these decisions, the learned Judges held that a pauper application should be rejected if all the beneficiaries are not mentioned. In our opinion, a plaint in a suit under the Fatal

(1) (1863) B. & S. 396.

(2) (1905) I. L. R. 28 Mad 479.

(3) I. L. R. 52 Calc. 602.

(4) (1934) I. L. R. 61 Calc. 480 ; 59 C. L. J. 221.

(5) (1934) 59 C. L. J. 391 ; 38 C. W. N. 551.

(6) (1934) 59 C. L. J. 394 ; 38 C. W. N. 553.

Accidents Act should not be carelessly drawn and should mention all the persons for whose benefit the suit was filed. In the present case, on the merits there has been no disadvantage to the respondent company, because there is a right to bring only one suit under this Act and the company cannot be sued again by the father. The Act clearly states "that not more than one action or suit shall be brought for, and in respect of the same subject-matter of complaint." The plaint in any such suit shall give full particulars of all the persons for whose benefit the suit has been brought and must further state the nature of the claim in respect of which damage is sought to be recovered. The learned Subordinate Judge has further found that although sufficient time had elapsed, the father had not come forward to claim any damages and the father is fairly well off and not dependent upon the son. In the pauper application, it would have been, in view of the above mentioned decisions of this High Court, a good ground for rejecting the same, but at the present stage there is no good reason for dismissing the claim of the plaintiffs on the ground that the father's name was left out as one of the beneficiaries.

As these are all the points urged at the hearing of the cross-objection, it fails and is dismissed.

We now come to the appeal which relates to the amount of damages.

The plaintiffs claimed Rs. 20,000 as damages. The learned Subordinate Judge allowed Rs. 1,500. In the appeal, by application which was allowed, the claim was modified to Rs. 6,000 only.

The learned Subordinate Judge has found on the evidence that the deceased belonged to the trader class; his father had a cloth shop, in which he was an assistant. As the shop belonged to his father, he was not in receipt of any pay, but was learning his business under his father whom he was helping. In return for this his father used to pay for the maintenance of his wife and children. He was a young man of 28 in sound health and had a reasonable prospect of a fairly long life. His father was old and aged about 60. In the ordinary course, he would have succeeded his father as a seller of cloth. These facts have not been challenged in the appeal and we accept them as correct.

The learned Subordinate Judge unfortunately has proceeded to calculate damages on wrong principles. He considered what

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a shop assistant in the service of another, about the age of the deceased, would be likely to get as his wages and what will be his earnings in such service when he grows older. There is a good deal of difference between a person who spends his life in the service of another and a person who throughout his life wants to remain an independent trader and with that object he is acquiring experience in the trade.

The learned Subordinate Judge has next proceeded to capitalise what he considered would have been the average wage of such a man in service. He has considered that after all his personal expenses were paid such a man could be assumed to have Rs. 125 a year to spend for his family. He has even asked himself the question :

"What sum of money bearing six per cent per annum interest and being reduced by Rs. 125 per year will exhaust itself in course of 30 years ?"

Obviously, what the learned Subordinate Judge was driving at was that the plaintiffs would be in the position of annuitants and would have no claim on the capital sum. Rs. 125 was a gross underestimate by the learned Subordinate Judge. But even if that amount had been correct, any table of annuities would have shown that Rs. 1,500 was too inadequate.

It is necessary in the present case to lay down the principles on which calculations as to damages should ordinarily be made in case of this nature. The basic principle is that laid down by Lord Blackburn in *Livingstone v. The Rawyards Coal Company* (1). It was said by him :

"Where any injury is to be compensated by damages, in settling the sum of money given for reparation or damages you should as nearly as possible get at that sum of money which would put the man who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting the compensation or reparation."

We may just mention that the general rule has some qualifications dependent upon malice, intentional or wilful wrong doing etc., In this case under Fatal Accidents Act, these qualifications have no application.

(1) (1880) 5 A. C. 29 H. L. (39).

In the various decisions which have been passed under this Act, it has not been always kept clearly in view that damages are claimed under two heads. It is unfortunate that this distinction has been overlooked and some of the decisions are very much open to criticism. No good purpose will be served by examining them at length. The Act itself lays down both the heads. In section 1 of the Act, a right has been given to ask for damages proportionate to the loss resulting from such death to the parties claiming such damages. This is the first head of damages; that is, it is reparation for the loss caused to the beneficiaries mentioned in the Act. There is a second head of claim which is mentioned in section 2 of the Act :

"Provided that in any such action or suit, the Executor, Administrator or Representative of the deceased may insert a claim for, and recover any pecuniary loss to the Estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the Estate of the deceased."

Under the English Law, no such confusion can arise, as in Indian decisions, because damages under the first head are recoverable by the Fatal Accidents Act, whilst damages under the second head do not fall within that Act but are now recovered under Law Reform (Miscellaneous Provisions) Act, 1934.

In the present case, there is no claim for damages under the second head. We, therefore, confine ourselves to the first head of loss to the beneficiaries themselves. There must be a pecuniary loss sustained by the persons claiming either actual or expected. Such pecuniary loss is evidenced by proof of a reasonable expectation of pecuniary benefit. There must be a certain amount of guess work, in estimating such expectation as various factors have to be considered which cannot be expressed arithmetically. At the same time sympathetic damages, or solatium for loss of companionship etc. are not relevant. The main criterion is the loss of reasonably expected pecuniary benefit. At the same time the probable earnings and future prospects of the deceased himself are taken into consideration, because the extent to which a person can benefit others depends largely on his earning capacity. In the present case, we consider that at least benefit to the extent of Rs. 30 per month would be reasonably expected by the wife and the children of the deceased from him. We have considered the table of annuities supplied to us from the Hindu Family Annuity Funds Limited by the plaintiffs'

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Advocate. We have also considered that in the class to which the deceased belonged, sons after a certain age begin to be able to maintain themselves. We have taken into consideration other circumstances relevant to the matter and we are of opinion that the loss jointly to the wife and the three children should be estimated at Rs. 6,000.

Generally and ordinarily, it is required under the Act that the share of each of the beneficiaries should be apportioned. The circumstances are rather special in this case. The children are very young, the mother is their natural and legal guardian and she has no adverse interest to them. If any amount is separately apportioned to the children, then there will have to be an order for security, which would not be desirable in the present case, as the widow is very poor. In view of the fact that the amount is small, and the circumstances mentioned we do not proceed to make any separate apportionment as a special case.

The order for costs passed by the learned Subordinate Judge should be modified in our opinion. In the court below, for the court-fees payable to the Government the plaintiffs would pay Rs. 600 and the defendant company the balance. The plaintiffs would get their costs in the court below on the basis of a claim for Rs. 6,000. The plaintiff appellants will get their full costs in this appeal—hearing fee 10 gold mohurs, and in the cross-objection each party will bear its own costs.

The court-fees in the appeal would be payable to the Government by the defendant company.

Mitter, J. :—I agree.

A. T. M.

*Appeal allowed :**Cross-objection dismissed.*

Before Mr. Justice P. Chakravarti.

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Calcutta House Rent Control Order (1943), sections 9(1), 9(4), 9A(1)—Lease and licence, difference between—Indian Easements Act (V of 1882) section 52—Licence—Arrangement by letter whereby "compensation" per month was provided for "temporary accommodation"—Tenancy, if created—Defaulter tenant—Permission of Rent Controller, if necessary.

If the terms are equally consistent with a license and a lease, the intention of the parties may be a useful and legitimate guide in determining the relationship actually created. But if, in the case of a written document the rights actually transferred exceed those of a license and make out a lease, it is quite impossible to reduce a lease to a license by speculating as to what the lessor might really have intended. If he intended less, his acts exceeded his intention and by the consequences of his acts he must abide.

Where the owner transfers the rights of ownership in a way which extinguishes their enjoyment by him and vests the enjoyment exclusively in the transferee an interest in the land is granted; but where the owner retains the rights of ownership but only subjects them to restrictions to the extent that some of the rights are transferred to another, then what he grants is either a license or an easement, but not an interest in land.

On a proper interpretation of the agreement wherein the words "temporary accommodation" and "compensation per month" are used avoiding the words "tenancy" and "rent per month", the status granted to the defendant was that of a tenant.

It is undoubtedly one of the common errors as to paragraph 9(4) of the House Rent Control Order to suppose that a defaulter is not entitled to any benefit under the order at all. What the sub-paragraph actually provides is that the defaulter will not be entitled to claim the benefit of "this paragraph", that is to say, paragraph 9. The requirement as to the permission of the Rent Controller is contained not in paragraph 9 but in paragraph 9A which is independent of paragraph 9. Paragraph 9(4), by itself, cannot therefore be a reason for excluding a tenant from taking up a plea under paragraph 9A.

The second part of paragraph 9A(1) can have application only where the court can pass a decree, if at all, by relying on clause (c) of the proviso to paragraph 9, that is to say, by holding that the immunity from ejectment

*Appeal from Appellate Decree No. 646 of 1946, with Civil Rule No. 545(s) of 1946, against the decree of B. M. Roy Chowdhury, Esq., Additional Subordinate Judge, 1st Court of Zillah 24-Parganas, dated the 1st of March 1946, affirming the decree of A. K. Das, Esq., Munsif, 3rd Court, Alipore, dated the 16th of July, 1945.

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which the tenant has otherwise established under the House Rent Control Order, is, on the facts of the case, overborne by the personal needs of the landlord or some other satisfactory consideration. It cannot apply where, the tenant being a defaulter, he is excluded from the benefit of paragraph 9 and therefore a decree can be passed under the general law, without the support of the special reason provided for in clause (c) of the proviso to that paragraph.

The defendant having been found to be a defaulter, permission of the Rent controller was not necessary in the present case which was pending when paragraph 9A came into operation.

Appeal by the Defendant.

Suit for ejectment.

The material facts appear from the judgment.

Messrs. A. C. Gupta, S. C. Lahiri and Biswanath Mukherji
for the Appellant.

Messrs. Hirulal Chakravarti and Shyamadas Bhattacharjee for
the Respondent.

C. A. V.

The following judgment was delivered :

July, 16.

Chakravartti, J. :—This appeal is by the defendant who, on being sued for ejectment from the premises where he was living, pleaded the Calcutta House Rent Control Order in bar. The courts below have refused this plea on two grounds : (1) that he is not a tenant at all but a mere licensee and (2) that assuming he is a tenant, he is a defaulter and therefore not entitled to the benefit of the Calcutta House Rent Control Order. A decree for ejectment has accordingly been passed and the defendant has appealed.

In opening the appeal, Mr. Gupta at first stated that in view of the second finding which was a finding of fact, his client could not claim the protection of the House Rent Control Order and could not expect a reversal of the decree for ejectment. He would, therefore, confine himself to the first finding and if he succeeded in getting it reversed and establishing a tenancy, that might be useful to his client in pursuing his remedy under the Calcutta House Rent Control Order in some other form, in view of certain recent amendments. When, however, Mr. Gupta's attention was drawn to paragraph 9A of the Order, he took a further point to the effect that the decree in the present case was bad, inasmuch as the permission of the Rent Controller had not been obtained.

The material facts are the following: It appears that the defendant's house at 2, Ashutosh Mukherji Road was requisitioned under the Defence of India Act and the requisitioning officer suggested that he might be provided with accommodation in the ground floor of the plaintiff's house at 84B, Shambhunath Pandit Street, which was close by. The plaintiff agreed or was made to agree and an arrangement was concluded between the parties under which the defendant was to be accommodated in the plaintiff's house for a specified period of roughly six months. It must be added that the plaintiff himself is not the owner of the house, but only a tenant.

The terms of the arrangement are to be found in a letter, dated the 11th July, 1943, which the defendant addressed to the plaintiff and which the latter confirmed. In the course of his defence, the defendant alleged that this letter had been obtained from him by coercion and he even raised an issue on the point. Both the Courts below have disbelieved this allegation which was as unworthy as it was untrue. The relationship between the parties has therefore to be ascertained from the letter to which I have referred.

In that letter the defendant first recites the circumstances in which he was going to occupy a portion of the plaintiff's house and states that the agreement was that he would be given "temporary accommodation" from the 14th July, 1943, up to the 31st December, of the same year. The area of occupation would be the entire ground floor, minus the garage, with the proviso that he would occupy the kitchen and the dining room a week later, that is to say, on the 21st July, 1943.

Proceeding next to recite the terms of his occupation, the defendant states that he would pay a sum of Rs. 70 per month, inclusive of all taxes, as "compensation for his occupation" and for each month he would pay on or before the 7th day of the next month. He would pay all electric charges for the ground floor for which there was a separate meter and would also pay one-third of the electric charges for the service pump. He puts it on record that he had paid the amount of a month's compensation by way of a deposit.

Next he proceeds to set out terms of his actual use of the premises which require to be set out in full:

"4. The control of the main entrance to the premises and of the collapsible gate to the stair case leading to the under stories of the building will remain entirely with you and you will be

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entitled to unrestricted passage from the main entrance to the said stair case throughout 24 hours of the day and night. I shall not be entitled to lock at any time any of these gates".

"6. The house service pump and its switches at the ground floor shall be at your disposal at all times and you shall be entitled to passage to the pump and reservoir."

"7. All your servants shall at all times be entitled to the use of the servants' bath room at the ground floor along with my servants etc".

Lastly, the letter recites that the defendant would vacate the premises before the 31st December, 1943, but would be entitled to vacate earlier. The plaintiff, however, would not be entitled to require him to vacate before the 31st December, 1943, if he himself remained in occupation. But if he himself vacated before that date and was unable to give vacant possession to his landlord by reason of the defendant's staying on, the latter would be bound to indemnify the plaintiff for all losses and damages suffered.

The courts below have held that the careful avoidance of the words "tenancy" and "rent" and the use instead of the words "temporary accommodation" and "compensation" made it clear that no tenancy was intended to be created. Support is sought to be drawn for this view from the circumstance that the Calcutta House Rent Control Order had already come into operation and the unpleasant possibilities for landlords under certain of its provisions had already become patent. It was therefore thought to be a reasonable inference that the plaintiff consented to admit the defendant to the occupation of his house only on condition that no status of tenancy was created and that the parties choose their language deliberately in order to represent their true intention of excluding the relationship of landlord and tenant.

Now, the border-line between a licence and a lease is often exceedingly thin and I shall certainly not stretch the terms of the agreement in the slightest degree for the purpose of finding a tenancy; but, in my view, the consideration relied upon by the courts below cannot avail against the terms of the engagement and the rights thereby conferred on the defendant. I would not say that the intention of the parties is immaterial in all circumstances. Often, it may be solely a question of intention when the status has to be gathered merely from some ambiguous dealings: and if the terms are equally consistent with a licence and a lease, the intention of the parties may be a useful and a legitimate

guide in determining the relationship actually created. But if, in the case of a written document the rights actually transferred exceed those of a licence and make out a lease, it is quite impossible to reduce a lease to a licence by speculating as to what the lessor might really have intended. If he intended less, his acts exceeded his intention and by the consequences of his acts he must abide.

Coming now to the terms which I have to consider in the present case, I do not propose to attempt a definition of licence in abstract terms and apply that definition. As has so often been said, each case must be decided on its own facts and regard must be had to the substance of the agreement. A test, as good as any that can be found, is laid down in Halsbury's Laws of England in the following terms: "If the effect of the instrument is to give the holder the exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is a lease; if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and control of the owner, it is a licence." Halsbury's Laws of England, Harlshem Edition, Vol. 20, p. 9. To this I would add the definition of licence as given in section 52 of the Indian Easements Act which however, so far as I am aware, does not apply to Bengal. The definition is in the following terms: "Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence." As to what "interest in land" means, it has been explained in numerous cases that where the owner transfers the rights of ownership in a way which extinguishes their enjoyment by him and vests the enjoyment exclusively in the transferee, an interest in the land is granted; but where the owner retains the rights of ownership but only subjects them to restrictions to the extent that some of the rights are transferred to another, then what he grants is either a licence or an easement, but not an interest in land.

Here, the defendant pays a monthly sum to the plaintiff for his occupation of the premises, but that circumstance is not conclusive, because a licence may be for consideration. He was to vacate by the 31st December, 1943, but that, again is not

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conclusive, for a licence may be for a term. He accepted the liability for taxes, but that too is not decisive, although it suggests a tenancy. But what, in my view, is decisive is the fact that he permits the plaintiff the use of a portion of the ground floor which can only be on the basis that the exclusive right of occupation of the ground floor has in the first instance vested in him and out of that right he is carving out a portion and making a re-grant thereof to the plaintiff. Obviously, in making the grant the plaintiff was not merely granting an use, reserving to himself the rights of ownership and control; for, had that been the case, he would be entitled to use the ground floor, so far as it was not used by the defendant, in his own right and would not require a permission. Mr. Chakravarti, who appeared for the plaintiff contended that the terms contained in clauses 4, 6 and 7 of the agreement were inserted merely by way of abundant caution and that what is said in them is only another way of saying that the defendant's use of the servants' bath room and privy would not be exclusive, but would be joint with the servants of the plaintiff and that his use of the ground floor would not be such as to exclude the plaintiff's use of the gate and the staircase or his access to the pump. In my opinion, the words actually used do not bear this interpretation. It is clear to my mind that clauses 4, 6 and 7 can be explained only on the basis that an exclusive right of occupation of the ground floor had vested in the defendant. Neither am I impressed by the argument accepted by the courts below that the use of the words "temporary accommodation" and "compensation" were conclusive. If that were so, the House Rent Control Order would be at the mercy of words and anybody could avoid it by simply avoiding the words "tenancy" and "rent".

In my view, on a proper interpretation of the agreement the status granted in favour of the defendant was that of a tenant.

I do not consider it necessary to discuss in detail the cases cited at the Bar. Mr. Gupta referred to the Full Bench decision in the case of the *Secretary of State for India v. Karuna Kanta Chowdhury* (1) and the case of the *Secretary of State for India v. Bhupal Chandra Roy Chowdhury* (2). They explain the true nature of a licence with the assistance of other case law. Mr. Chakravarti referred to the case of the *Acting Secretary, Board of Revenue v. The Agent, South Indian Railway* (3). Of this case

(1) (1907) I. L. R. 35 Calc. 82; 6 C. L. J. 342.

(2) (1929) I. L. R. 57 Calc. 635.

(3) (1924) E. L. R. 48 Mad. 368.

it is enough to say that the reason why the grant was found to be a licence is manifest from the very first term of the agreement which shows that the grantee was only given the use of the land for a particular purpose.

The question next to be considered is whether, even if the defendant be a tenant, any defence under the House Rent Control Order is open to him in view of the fact that he is a defaulter. Mr. Gupta did not challenge the finding that a default had been committed, but he contended that the consequence of the default was not to debar the defendant altogether from taking any plea under the House Rent Control Order. While he was not entitled to plead paragraph 9 and contend that the plaintiff was not entitled to ejectment at all, he was nevertheless entitled to contend under paragraph 9A that no decree could be made in the plaintiff's favour unless he obtained the permission of the Rent Controller to prosecute the suit. The contention is based on the fact that in paragraph 3 of the plaint the plaintiff stated that he required the house for his own purposes.

Since I am not accepting this contention, it is only fair to state that Mr. Gupta did not intend to urge it originally but merely took it up at a suggestion from me, although he ultimately argued that the point was a good point.

On further consideration, it seems to me that this contention would not be correct in the facts of the present case. It is undoubtedly one of the common errors as to paragraph 9(4) of the House Rent Control Order to suppose that a defaulter is not entitled to any benefit under the Order at all. What the subparagraph actually provides is that the defaulter will not be entitled to claim the benefit of "this paragraph", that is to say, paragraph 9. The requirement as to the permission of the Rent Controller is contained not in paragraph 9, but in paragraph 9A which is independent of paragraph 9. Paragraph 9 (4), by itself, cannot therefore be a reason for excluding a tenant from taking up a plea under paragraph 9A.

But on the actual terms of Paragraph 9 (A) (1), there is, it appears to me, a difference in position between suits instituted after the enactment of the paragraph and suits which were pending when the paragraph came into force. The paragraph reads thus :

"9A. (1). No suit or proceeding by a landlord against a tenant in possession of a house for eviction of such tenant therefrom in which any of the grounds specified in clause (c) of the proviso

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to sub-paragraph (1) of paragraph 9 has been taken as a ground for such eviction shall be entertained by any Court or, where any such suit or proceeding by a landlord is pending in any Court on the twenty-second day of May, 1944, no decree or order for the recovery of possession of the house in respect of which such suit or proceeding is pending shall be made by such Court on any of the grounds specified in the said clause (c) unless the landlord has been permitted by the Controller by an order in writing under sub-paragraph (3) to institute such suit or proceeding or to prosecute the suit or proceeding so pending, as the case may be, and has produced before such Court proof that such permission had been granted".

This paragraph came into operation on the 22nd of May, 1944. The suit in the present case was brought on the 25th February, 1944, and the decree was passed on the 16th July, 1945. We are therefore concerned only with the second part of paragraph 9 (A) (1) which relates not to suits instituted after the promulgation of paragraph, but to the making of a decree or order in suits which were pending at the date when the paragraph came into force.

It has been seen from paragraph 9A (1), which I have just read, that it is concerned solely with those suits in which the grounds for eviction are those specified in proviso (c) to clause (1) of paragraph 9. The grounds specified in that clause are that the house is *bona fide* required by the landlord for his own use or the use of any person for whose benefit the house is held or that the landlord can show some cause which may be deemed satisfactory by the Court. In view of the statement contained in the plaint, we are concerned here only with the first part of the proviso (c), namely, where the house is *bona fide* required by the landlord for his own use.

As I have had occasion to explain in another case arising out of the Bengal House Rent Control Order, the so-called grounds mentioned in the proviso to clause (1) of paragraph 9 are not grounds for eviction in the true sense of the term, but merely the reasons for which a court may pass a decree for ejectment in spite of the House Rent Control Order. The scheme of paragraph 9 appears to me to be this: The landlord has in the first instance to make out a ground for ejectment under the general law. When he had reached that stage, then, if the tenant has meanwhile pleaded the House Rent Control Order, a decree for ejectment shall not, in the absence of anything else, be passed, so

long as the tenant pays the allowable rent. Then comes an exception to this exception and it is to the effect that in spite of the House Rent Control Order and in spite of the tenant not being a defaulter, a decree shall be passed, if one or other of the reasons set out in the three provisos to clause (1) is found to exist. The so-called grounds or reasons mentioned in the provisos to clause (1) of paragraph 9 are therefore merely exceptions to the defence which the tenant may set up under the House Rent Control Order. It is clear that no recourse to the exceptions is necessary when no defence under paragraph 9(1) of the Order is available to the tenant. An occasion for passing a decree on one or other of the grounds enumerated in the provisos and arise only when the tenant is entitled to take a plea under paragraph 9(1) of the House Rent Control Order and has taken it and the Order requires to be overcome by the application, if possible, of the special considerations set out in the provisos.

Proceeding next to paragraph 9A(1), the meaning of the first part is reasonably clear. If, after the promulgation of this paragraph, a suit for ejectment of the tenant is brought and the plaint contains a statement that the landlord require the house for his own use, the suit shall not be entertained, unless proof of permission of the Rent Controller is produced. The language in this part of the paragraph is "in which any of the grounds specified in clause (c) of the proviso to sub-paragraph (1) of paragraph 9 has been taken as a ground for such eviction." The only requisite, therefore, is the taking of a ground by the plaintiff, without more. The language in the second part of the paragraph, however, is noticeably different. There, all that is said is that "no decree or order for the recovery of possession..... shall be made by such Court on any of the grounds specified in clause (c) unless the landlord has been permitted by the Controller etc". The prohibition here is addressed to the making of the order or the decree and the decree or order which the Court is forbidden to pass without the permission of the Controller is a decree or order on one of the grounds specified in clause (c) of the proviso to paragraph 9. But, if the tenant is a defaulter, then a plea under paragraph 9 is not open to him at all by reason of the opening words of clause (1) of that paragraph and also by reason of the more definite prohibition contained in clause 4. In such a case, there can be no occasion for having recourse to clause (c) of the proviso and there will be no decree on the ground mentioned there. As explained already,

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where the tenant is a defaulter, paragraph 9(1) of the House Rent Control Order is not at all in the Court's way and the Court does not require to rely upon any of the special reasons or grounds, given in the proviso to paragraph 9(1), in order to be able to pass a decree for ejectment. It will simply pass a decree under the general law. If it does so, it will not even where the landlord requires the house for his own use, pass a decree "on any of the grounds specified in clause (c) of the proviso to paragraph 9(1)" and it will not be passing a decree of the kind which paragraph 9A(1) forbids it to pass without proof of the Rent Controller's permission. In other words, the paragraph will not be attracted at all.

To put the matter briefly, the second part of paragraph 9A(1) can have application only where the Court can pass a decree, if at all, by relying on clause (c) of the proviso to paragraph 9, that is to say, by holding that the immunity from ejectment which the tenant has otherwise established under the House Rent Control Order, is, on the facts of the case, overborne by the personal needs of the landlord or some other satisfactory consideration. It cannot apply where, the tenant being a defaulter, he is excluded from the benefit of paragraph 9 and therefore a decree can be passed under the general law, without the support of the special reason provided for in clause (c) of the proviso to that paragraph.

Mr. Gupta contended that although as a matter of language the result might be what I have indicated, as a matter of reason the first and second parts of paragraph 9A(1) should be construed as bearing the same meaning. He contended that the intention of paragraph 9A(1) obviously was that so far as suits brought after its promulgation was concerned, they could not be entertained at all without the permission of the Rent Controller. It could not at the same time have meant that if there was a suit pending at the time the paragraph came into operation, then in such suit the court might go on with the evidence and it would have to call for permission from the Rent Controller only after it had decided, if it so decided at all, that the House Rent Control Order was otherwise available to the tenant and, in order to exclude it, the landlord would require to rely upon the reasons given in clause (c) of the proviso to clause 9(1). The court, as it were, would have to make mentally a compartmental decision in advance. Mr. Gupta contended that the same provision could not be interpreted as contemplating such different

consequences in the case of suits yet to be instituted and pending suits. It would be more reasonable to hold that in both cases, before the Court could deal with the suit or deal with it further, permission of the Rent Controller would have to be obtained.

Giving my best consideration to this matter, I am not prepared to accept the contention of Mr. Gupta. The paragraph concerned is elaborately and carefully expressed and it is clear to my mind that the draftsman did intend to make a distinction between future suits and suits then pending. The substance of the matter is that before the court could make a decree on any of the grounds specified in clause (c) of the proviso to Paragraph 9(1) it would have to see that the plaintiff had satisfied the Rent Controller that the reasons mentioned in the proviso existed. In the case of plaint filed after the promulgation of the paragraph concerned, it requires this preliminary step to be taken before the court takes up the hearing of the suit. In the other case, the suit having already proceeded to a certain extent, the paragraph does not require the plaintiff to go unnecessarily to the Rent Controller till it is found or till it appears that he would require the permission in order to obtain a decree. This may have been the reason for making a distinction or may not have been; but I am concerned only with the language in which the paragraph is expressed. The language, in my view, is unambiguous and does not admit of the interpretation which Mr. Gupta suggested, although on his interpretation the two parts of the paragraph might perhaps be more consistent in their requirements.

For the reasons above indicated I am of opinion that the defendant having been found to be defaulter, permission of the Rent Controller was not necessary in the present case which was pending when paragraph 9A(1) came into operation.

I may add that even if I held that permission of the Rent Controller was necessary, I am doubtful whether the consequence would be to reverse the decree of the lower appellate court to the extent of dismissing the plaintiff's suit. Paragraph 9A(1) does not say that in the absence of permission from the Rent Controller, the suit shall be dismissed. It only says that no decree or order shall be made. One way of giving a meaning to these words is to take them as implying that after the hearing of the suit is concluded, the making of the decree shall be postponed till such time that the plaintiff is able to bring permission from the Rent Controller. It may be that such time will be indefinite. While at the Bar, I ventured to put forward such

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an implication of an indefinite pendency with respect to paragraph 9(1) of the Order in the case of *Babulall Chowkani v. Hari Prosad Roy* (1) before Justice Henderson and the interpretation was at least not rejected. But however that may be, since in the present case both the courts below found that the defendant was a licensee and I have found that he is a tenant, I would have given an opportunity to the plaintiff to obtain the permission of the Rent Controller now. In view of the finding on the second point, however, it is not necessary to pursue this matter further.

The result is that this appeal fails and is dismissed with costs.

No order is necessary in the connected Rule.

Leave to appeal under clause 15 of the Letters Patent, asked for by the Plaintiff, is refused.

S. C.

Appeal dismissed with costs.

(1) (1943) 48 C. W. N. 48.

*Before Mr. Justice R. C. Mitter and Mr. Justice
A. S. M. Akram.*

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May, 1, 2, 3.

RAJBARI BANK LTD. AND OTHERS

v.

RANI HARSHAMUKHI SINGHA AND OTHERS.*

Transfer—Transfer of Property Act (IV of 1882), section 53—Transfer of property by judgment-debtor for consideration—Test—Reference to some creditor—Burden of proof—Intent to defeat or delay—Good faith.

In order to succeed under section 53 of the Transfer of Property Act it must be established that the vendor or the transferor acted in the matter with the intent to delay or defeat his creditors generally, that is to say, all his creditors. If the transferor intends to prefer some creditors of his, that is to say, to pay out of the consideration money some of his creditors in preference to others and even with the firm intent of not paying at all those others, the case would not come within section 53.

* Appeal from Original Decree No. 6 of 1944, against the decree of M. N. Gan, Esq., Subordinate Judge, 1st Court, Faridpur, dated the 27th day of August, 1943 in Title Suit No. 10 of 1940.

The onus to prove the fraudulent intent, that is to say, the intent on the part of the transferor to defeat or delay his creditors generally, is on the persons who challenge the transaction under section 53. If they establish that that intent was present in the transferor, then the transferee will have to show, in a case when the transfer was for a consideration, that he had acted in good faith.

The mere fact of the general knowledge that the transferor was in financial embarrassment would not, by itself, establish want of good faith on the part of the transferee. Assuming that there was fraudulent intent on the part of the transferor, it cannot be said that the transferee was taking the conveyance mala fide, unless it is established that she knew of that fraudulent intent or was a party to the conspiracy for cheating the creditors. If she took the conveyance in the belief that the price would be paid to the pressing creditors, there could be no mala fides on her part.

Appeal by the Defendants.

Suit under order 21 rule 63 of the Code of Civil Procedure.

The material facts will appear from the judgment.

Messrs. Panchanan Ghose, Bansorilal Sarkar, Prakash Chandra Pakrashi, Himaja Sanhar Majumdar and Bijoy Kumar Bhose for the Appellants.

Messrs. Atul Chandra Gupta, Chandra Sekhar Sen and Sushil Chandra Dutt for the Respondents.

C. A. V.

The judgment of the Court was delivered by

Mitter, J. :—Kumar Arun Chandra Sinha was the proprietor of eight annas share of the Paikpara Raj Estate known as the Bhulua Estate. His properties consisted of revenue paying estates in the districts of Noakhali, Bakergunge, Faridpore and other districts. He mortgaged all his properties in favour of Raja Janakinath Roy and his co-sharers. Raja Janakinath Roy and his co-sharers instituted a suit on the said mortgage in the Original Side of this Court in the year 1934 and recovered a preliminary decree for Rs. 25,00,000 and odd. By the decree Mr. Meyer was appointed a receiver with a direction to pay a sum of Rs. 750 month by month to Kumar Arun Chandra Sinha and to apply the balance in deduction of the mortgage dues. In pursuance of this decree Mr. Meyer as receiver took possession of the Bhulua Estate and at the material point of time, namely, September, 1938, Rs. 19,00,000 and odd was due to the mortgagees.

Kumar Arun Chandra Sinha had other debts. He borrowed a sum of Rs. 45,000 on a promissory note from the Rajbari Bank Ltd. and another substantial sum on another promissory note from the Faridpore Bank Ltd. The Rajbari Bank Ltd. and the Farid-

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pore Bank Ltd. are, respectively, defendants Nos. 1 and 2 in the suit in which this appeal arises. In the year 1929 the former brought a suit in the Original Side of this Court on the said promissory note and recovered a decree for Rs. 53,000 and odd against the Kumar. The Faridpore Bank Ltd. also sued the Kumar and got a decree in the same year in the Original Side of this Court for a sum of Rs. 54,000. In 1938, the Rajbari Bank Ltd. got its decree transferred to Faridpore. After the decree had been transferred it started execution in the Court of the Subordinate Judge, Faridpore, in August, 1938. That execution case was numbered 118 of 1938. Nothing came out of this execution case. It was dismissed for default on the 17th of December, 1938. On the 20th of December, 1938, the Rajbari Bank Ltd. started execution again. This execution case was numbered 136 of 1938 and in the course of that execution Touzi No. 3756 of the Faridpore Collectorate which was one of the properties which had belonged to the Kumar was attached on the 16th and 31st of March, 1939. On the 30th of August, 1939, Rani Harshamukhi Sinha, the plaintiff in the suit and the respondent in the appeal before us, preferred a claim to the property attached, but that claim was summarily rejected on the next day on the ground that it had been filed too late. The property attached was sold on the 10th of April, 1940, and was purchased for the sum of Rs. 1000 by the Rajbari Bank Ltd. and the Faridpore Bank Ltd.

In execution case No. 136 of 1938 the last mentioned Bank had applied for rateable distribution under section 73 of the Civil Procedure Code. Rani Harshamukhi filed this suit in which the appeal arises on the 4th of July, 1940, under the provisions of Order XX, Rule 63 of the Code of Civil Procedure. Her case is that she is the owner of the said touzi as the Kumar had by a registered deed of conveyance dated the 20th of September, 1938, conveyed the said property along with other properties of the Kumar for a consideration of Rs. 50,000. From the dates that we have given above, this conveyance was executed some time before the property in question was attached by the Rajbari Bank Ltd. The defendants to the suit are the Rajbari Bank Ltd., the Faridpore Bank Ltd., Kumar Arun Chandra Sinha and Mr. Meyer, the receiver appointed in the mortgage suit of 1934. Neither the receiver nor the Kumar entered appearance. The Rajbari Bank Ltd. and the Faridpore Bank Ltd. filed two separate written statements. They contended that the conveyance by the Kumar in favour of Rani Harshamukhi was a fictitious transaction, that is

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1938, the Rani was staying at Ranchi with her grandsons, but her manager, namely, the manager of her grandsons' estate namely Ananga Mohan Mukherjee was staying at her Paikpara house which is in the suburb of Calcutta. The Kumar was also staying at No. 4, Rustomji Parsi Road, Cossipore, another place very near to Calcutta and very near to Paikpara. On the 22nd of August, 1938, the Kumar wrote a private letter to the Rani: In that letter he stated that he required Rs 50,000 very urgently and requested her to lend that sum to him with a promise that he would repay with as little delay as possible; that if she were agreeable to the proposal, she may direct her manager Ananga to pay the same to him and to tell Bimal and his brothers about it, whom the Kumar himself did not like to approach. The answer of the Rani to the Kumar is not on record but what that answer was can be gathered from the further correspondence. The answer was that the Rani was not willing to advance the money and the Kumar was mildly rebuked by her, she pointing out to the Kumar that there were many moneylenders to whom the Kumar could go if he was in need. This fact appears from the Kumar's letter to the Rani dated the 28th of August, 1938. On receipt of the reply from the Rani the Kumar wrote this letter. In it he stated that it was not his practice to approach his relations for financial help if he could manage to get money otherwise, but that he had to approach Rani because he was otherwise helpless. He further stated that if the Rani was not agreeable to advance the said sum of Rs. 50,000 by way of loan he was willing to sell the *malikana* interest in all his zemindary properties in Noakhali, Faridpore etc either to the Rani or to the estate of which the Rani was the executrix. He made a frantic appeal for touching the Rani's feelings by saying that the Rani had money and could easily, if she so minded, save him from the dishonours that was in store for him if he failed to pay his pressing creditors. It appears from the further correspondence that the Rani agreed to purchase the property at Rs. 50,000 out of her own *stridhan* money and instructed Ananga to take the necessary steps for the completion of the conveyance. She intended to come back to Calcutta after the Durga Pujas were over and was under the impression that it would do if she paid the money to the Kumar and took the conveyance after coming back to Paikpara from Ranchi, but the Kumar represented to her that he required the money most urgently. On that she gave instructions to Ananga to take the money out of the estate of her grandsons, Bimal and his

brothers, pay the money to the Kumar on the completion of the conveyance with a promise that as soon as she would come back to Paikpara she would repay the said Rs. 50,000 to the estate. This is the history of the case.

Ananga got in touch with the Kumar and instructed Messrs. H. N. Dutt & Co., Solicitors, who were the solicitors of the Rani, to investigate the title. Mr. Dutt caused searches to be made, drafted the conveyance and the conveyance was actually executed and registered in his office on the 20th of September, 1939. The memorandum of consideration is as follows : 50 Government Currency Notes Nos. A/O-103429-103478 for Rs. 1000 each. The documentary evidence on the record is as follows : The estate of Bimal Chandra Sinha and his brothers had an overdraft account (Account No. 2) in the Imperial Bank of India at Calcutta. Ananga, the manager, had authority to draw on that account. On the 20th of September, 1938, the date of the conveyance, Ananga drew a cheque on self for Rs. 50,000 and presented the same for payment. These identical Government Currency Notes which are mentioned in the memorandum of consideration to the conveyance were the notes which were paid to Ananga for that cheque. By a chalan, Exhibit. 7, which gave the necessary details, Ananga caused this amount to be entered into the *rokhars* of the estate of Kumar Bimal Chandra Sinha and others. The *rokar* entries have been printed showing the credit of this sum of Rs. 50,000 brought into the said estate from the Imperial Bank. On the same date there is a debit entry in the *rokhars* of that estate that the said amount was paid over to Rani Harshamukhi as an advance. The relevant *rokar* entries have been marked Exs. 6-A and 6-B. The conveyance was executed and the said Currency Notes were handed over to the Kumar and he gave a formal receipt for the same. The payment was made in the Solicitor's office where the conveyance was executed in the presence of the attesting witnesses and in the presence of another Solicitor, Mr. Jyotish Bose, who was not an attesting witness but who was a Solicitor-assistant in the Firm of Messrs. H. N. Dutt & Co., The Rani came back from Ranchi to Paikpara on the 7th October, 1938, which was the Troyodoshi day, that is to say the first auspicious day after the Durgapuja for undertaking a journey. On the same day she forwarded the sum of Rs. 50,000 from her own personal funds to the Manager of the estate of Kumar Bimal Chandra Sinha and others. The letter runs as follows :

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"To

Respected Srijukta Babu Ananga Kumar Mukherjee, Manager.

Sir,

With reference to my D. O. letter dated 1st June, 1945/18th September, 1938, I send to-day rupees fifty-thousand as per details given below through the officer of the household department, Babu Apurba Krishna Chatterji. Please enter the same in the jamakharach (account) and acknowledge receipt.

Sd/- Sri Harashamukhi."

The details of the notes were as follows: Four Government Currency Notes, each of Rs. 10000 and small notes of Rs. 100 and Rs. 10 for Rs. 10,000. The D. O. letter of the 18th of September, 1938, which is referred to in this letter was the letter which she had written from Ranchi to Ananga asking him to pay the consideration money out of the estate of Kumar Bimal Chandra Sinha and his brothers with a promise that she would repay the money from her own *stridhan* money as soon as she would be back to Paikpara. The letter shows that the money was given from her own personal money, because it was passed on to the manager Ananga through the officer who was in charge of the household department. After receipt of this money a challan was prepared on the same day and through that challan this money was put into the estate of Kumar Bimal Chandra Sinha and his brothers and consequential entries were made in the *rohars* of that estate. Rani Harshamukhi has deposed that she paid the Rs. 50,000 on her arrival to Paikpara on the 7th October, 1938, in repayment of the money which was drawn from the estate of Kumar Bimal Chandra Sinha and his brothers on her behalf for payment of the consideration money to Kumar Arun Chandra Sinha. Ananga, the manager, who is an attesting witness to the *kobala* has deposed as also Mr. Jyotish Chandra Bose, the solicitor assistant of the firm of Messrs. H. N. Dutt & Co., and they have stated that the money was actually handed over to the Kumar at the time of the registration of the conveyance. There is no reason why we should disbelieve the evidence of such a respectable lady as Rani Harshamukhi is, nor is there any reason for disbelieving the two witnesses Mr. Jyotish Chandra Bose and Ananga Kumar Mukherjee and especially as the overwhelming documentary evidence which we have recited above fully supports their oral testimony. We accordingly hold that

the conveyance of the 20th of September, 1938, by Kumar Arun Kumar Sinha to Rani Harshamukhi represented a real transaction and the price of Rs. 50,000 was actually paid to Kumar Arun Chandra Sinha.

The only other question that remains for consideration is whether the sale to the Rani can be avoided under the provisions of section 53 of the Transfer of Property Act.

In order to succeed under section 53, two things will have to be established: (1) that the vendor or the transferor acted in the matter with the intent to delay or defeat his creditors. The intent must be an intent to defeat or delay his creditors generally, that is to say, all his creditors. If the transferor intends to prefer some creditors of his, that is to say, to pay out of the consideration money some of his creditors in preference to others and even with the firm intent of not paying at all those others, the case would not come within the section, section 53, of the Transfer of Property Act. That position is well settled in law and we need not burden our judgment by referring to the cases which have taken that view. The onus to prove the fraudulent intent, that is to say, the intent on the part of the transferor to defeat or delay his creditors generally, is on the persons who challenge the transaction under section 53 of the Transfer of Property Act. If they establish that that intent was present in the transferor, then the transferee will have to show, in a case where the transfer was for consideration, that he had acted in good faith. In the light of the observations which we have made above, it is now necessary to examine the facts of the case. We may at once say that the evidence on the record is insufficient and no inference can be made that in selling those properties to the Rani the Kumar had the fraudulent intent of defeating or delaying his creditors generally.

The facts on which reliance has been placed by the learned Advocate appearing on behalf of the appellants for the purpose of establishing fraudulent intent on the part of the Kumar are these: (1) that the Kumar was heavily indebted; (2) that he sold all the properties which he had to his relation, the Rani; (3) that he sold them in a great hurry and (4) that he sold them at a price which was far less than the real value of the *malikana* which he had in the properties.

We have already stated that the mortgagee was in possession of all the immovable properties of the Kumar through a receiver and the dues of the mortgagees at the date of the conveyance

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was nearly Rs. 20,00,000. In the course of four years from 1935 to 1938, the receiver had paid to the mortgagees about Rs. 5,50,000. The house at No. 1, Harrington Street which belonged to Kumar Arun Chandra Sinha had been sold for Rs. 4,00,000 and that amount had been paid to the mortgagee. Out of the Rs. 5,50,000 that the mortgagee got from the date of the preliminary decree up to September, 1938, Rs. 4,00,000 is accounted by the sale price of premises No. 1, Harrington Street which was passed on to the mortgagees in part payment. In the course of four years, therefore, a sum of about Rs. 1,50,000 was the amount which could be paid by the receiver to the mortgagees from out of the rents and profits of the mortgaged properties. It is quite clear that the reversion which was the subject matter of the sale would fall into possession and enjoyed after a considerable number of years from the date of the conveyance. There is also other evidence on the record which the learned Subordinate Judge has dismissed in his judgment, and we do not wish to repeat those facts again, that the value of what in effect was the reversion which Rani Harshamukhi purchased from the Kumar on the 20th of September, 1938, could not be much more than Rs. 50,000.

No doubt, the Kumar was heavily involved in debts and it may be that Rani Harshamukhi or her officers were aware in a general way of the embarrassed condition of the Kumar, but the letters of the Kumar referred to in the earlier part of our judgment show that he was being pressed very hard by some of his creditors and he was under the apprehension that there would be a risk to his honour and prestige if he could not satisfy them or at least some of them by making payments. There is no evidence on the record which would even support a bare suggestion that the Kumar made a pretence to the Rani for obtaining Rs. 50,000 with the real intention of keeping it in his own pocket without making payments to any of his creditors. No doubt the Rani was a relation of his, but the correspondence shows that the Rani was not out for accommodating him at any cost. In fact, the Rani, having regard to the effect of the past financial relations with the Kumar, was not willing to advance the sum of Rs. 50,000 to the Kumar by way of loan and went so far as to give him a very curt reply to his request for the loan. It is only when she realised that the honour and prestige of the seniormost male member of the family would suffer if the latter could not make payment to his pressing creditors that she consented to take the

said conveyance. The alleged haste in completing the transaction does not, in the circumstances of this case, create any suspicion when the facts of this case are looked to. It cannot be said that the transaction was completed with undue haste. There is, after all, a distinction between undue haste and promptness in completing a transaction. The Rani agreed to take the conveyance by the end of August. The conveyance was actually completed on the 20th of September, 1938. There was thus a gap of about three weeks in between the two dates and searches investigation in title was made. We do not wish to enter into the details as we have come to the conclusion that there the evidence is not sufficient from which a reasonable inference can be made that in making the conveyance Kumar Arun Chandra Sinha was acting with the intent of delaying or defrauding his creditors. In this view of the matter, it is not necessary to consider in detail whether the transferee, namely, the Rani, acted in good faith. The mere fact of the general knowledge that Kumar Arun Chandra Sinha was in financial embarrassment would not, by itself, establish want of good faith on her part. Assuming that there was fraudulent intent on the part of the Kumar, it cannot be said that she was taking the conveyance *mala fide*, unless it is established that she knew of that fraudulent intent or was a party to the conspiracy for cheating the creditors. It may well be that she believed the Kumar when he stated in his letter that the creditors were pressing him hard and some payments at least were required to be made. If she took the conveyance in the belief that the price would be paid to the pressing creditors, there could be no *mala fides* on her part.

For these reasons we affirm the decree of the learned Subordinate Judge and dismiss this appeal with costs.

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Appeal dismissed.

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*Before Mr. Justice B. K. Mukherjee and Mr. Justice
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RAJA GOPAL LAL ROY BAHADUR, WARD OF COURT
BY ITS MANAGER, TAJHAT WARDS ESTATE

v.

FESERU MAHAMMAD SHAH CHOUDHURY
AND OTHERS.*

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March, 15, 25.

Bengal Tenancy Act (VIII of 1885)—Transferee of non-transferable holding not recognised as tenant by landlord—Transferee's acquisition of status by adverse possession for more than 12 years—Rent suit against recorded tenant by landlord, if maintainable.

On transfer of the non-transferable occupancy holding by the original tenant long before occupancy rights became transferable in law, the landlord becomes entitled to re-enter the land at once. If the landlord does not take any steps to recover possession of the property and allows the transferee to remain in occupation of it for 12 years or more, the latter would acquire a limited interest of a tenant by adverse possession and the right of the landlord to recover khas possession of the land would be barred by limitation unless he can make out a case under section 18 of the Indian Limitation Act and prove that he was kept out of his knowledge of his right to institute the suit by reason of any fraud committed by the transferee.

Probhabati Dasri v. Talbutunnessa (1) and *Panchhari v. Maharaj Bahadur* (2) followed.

The unrecognised transferee whose possession was *prima facie* adverse to the landlord from the date of his purchase would acquire the status of a tenant in full sense of the word, and although the landlord did not recognise him as a tenant he would have all the rights of a tenant by the operation of the statute of limitation in his favour and the landlord cannot proceed against the original tenant who is no more liable for rent.

The sale in execution of a decree obtained against the original tenant without making the transferee a party to the suit would not affect the rights which the latter has acquired by adverse possession. Where the transferee of a non-transferable occupancy holding has acquired the title of a tenant by adverse possession of the limited interest, the transferee and not the transferor is liable for rent. So a suit by landlord against the transferor of non-transferable occupancy holding after his acquisition of limited

*Appeal from Appellate Decree No. 842 of 1941, against the decree of S. K. Sen Esq., District Judge of Zillah Rangpur, dated the 7th May, 1941, affirming the decree of Muhammad Abul Ahman Esq., Subordinate Judge of Rangpur, dated the 23rd day of August 1940.

(1) (1913) 17 C. W. N. 1088.

(2) (1914) 19 C. W. N. 136.

interest by the transferee for rent, does not bind the transferee. But before his acquisition of such limited interest, the transferor was liable.

Kalap Choudhuri v. Sitab Chand (1) explained :

Yitendra Nath v. Binods Behari (2) followed.

Appeal by Defendant No. 1.

Suit for declaration by the Transferees of an occupancy holding.

The material facts will appear from the judgment.

Messrs. Gopendra Nath Das, Shambhu Nath Banerjee (Sr) and *Satindra Nath Chatterjee* for the Appellant.

Messrs. Nagendra Chandra Choudhury, Radhika Ranjan Guha and *Gaganendra Krishna Deb* for the Respondents.

Mr. Surojit Chandra Lahiri for the Deputy Registrar.

The following judgment was delivered :

Mukherjea, J. :—This appeal is on behalf of defendant No. 1 and it arises out of a suit commenced by the plaintiffs, who purport to be the transferees of an occupancy holding, for a declaration that an *ex parte* rent decree obtained by defendant No. 1 as landlord against the recorded tenants and the execution sale in consequence thereof, under which the holding in arrears was put up to sale and purchased by the landlord, were fraudulent and inoperative and did not affect the plaintiffs' rights in the same. The facts material for our present purposes may shortly be stated as follows :—

The property in dispute is admittedly an occupancy holding and it was held by one Khos Muhammad under defendant No. 1 as landlord. In the landlord's *sherista*, the holding was recorded in the names of the three sons of Khos Muhammad, namely, Amiruddin, Kamaruddin and Badaruddin. On the 8th March, 1907, which was long before occupancy rights became transferable in law, Khos Muhammad sold the entire *jote* to three persons, to wit, Muhammad Nasaruddin, Fesru Mahammad, and Kasimuddin. Subsequently, Nasaruddin died, and his one-third share in the holding was transferred by his widow and heiress Golapi Bibi to Fesru, who thus acquired two-thirds share in the holding, while the remaining one-third share belonged to Kasimuddin. There is no evidence that these purchasers were recognised as tenants by the landlord. They went on paying rents in the names of the old recorded tenants and in the

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(1) (1932) I. L. R. 11 Pat. 798.

(2) (1919) 52 I. C. 289.

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dakhilas, they were not even described as *marfatdars* of the latter.

In 1933, defendant No. 1 instituted a rent suit against the recorded tenants claiming rent in respect of the holding for the years 1336 to 1339 B. S. This was registered as Rent Suit No. 4024 of 1933. It culminated in a decree and in execution of the decree, the holding was put up to sale and was purchased by the landlord decreeholder on the 5th February, 1937. On the 4th February, 1939, the decree-holder purchaser took delivery of possession of the holding through Court.

On the 16th November, 1939, the present suit was brought by Fasru and Kasimuddin as the two plaintiffs for a declaration that the *ex parte* rent decree obtained by defendant No. 1 was secured by fraudulent suppression of summons, and the sale in execution thereof was also tainted with fraud and material irregularities. The plaintiffs, it was averred, not being made parties to the rent suit or to the subsequent proceedings, their interest in the holding was not in any way affected by the decree and the sale. The original tenants or rather their heirs were impleaded as parties defendants to the suit—defendants Nos. 2 to 8 being the heirs of Amiruddin and defendants Nos. 10 to 12 being the heirs of Badaruddin. Kamaruddin who is alive figures as defendant No. 9 in the suit.

The suit was contested by defendant No. 1 alone. The contentions raised on his behalf, in substance, were, that the suit was not maintainable in the present form and was barred under section 42 of the Specific Relief Act. It was averred that the recorded tenants of the holding were the three brothers, namely Amiruddin, Kamaruddin and Badaruddin, and the holding being a nontransferable occupancy *jote*, the purchaser did not acquire any interest by the transfer which was not recognised by the landlord. Defendant No. 1 was consequently quite competent to proceed against the recorded tenants for recovery of arrears of rent and to put up the holding to sale in execution of a decree obtained against the latter. Defendant No. 1 denied that there was any fraud or suppression of notices in connection with the rent suit or the proceedings in execution thereof.

Both the Courts below have decreed the plaintiffs' suit. The Trial Judge held *inter alia* that the Rent Suit No. 4024 of 1933 had not the effect of a rent decree, and the proceedings in execution of the same were vitiated by fraud. The plaintiffs' title to and interest in the holding were consequently not affected by

the sale and they were entitled to the declaration prayed for. The District Judge who heard the appeal affirmed the decision of the Trial Judge, but did not affirm all the findings arrived at by the latter. The District Judge held that there was no fraud committed by defendant No. 1 in the matter of the rent suit or the proceedings in execution thereof and that the plaintiffs were not entitled to any relief on the footing that the execution sale was vitiated by fraud. He held further that the decree obtained in Rent Suit No. 4024 of 1933 was a rent decree; but in spite of these findings, he concurred with the Trial Judge in decreeing the plaintiffs' suit on the ground that on the decided authorities of this Court, he was bound to hold that the plaintiffs did acquire by adverse possession the limited interest of a *ruiyat* long before the rent suit was brought by the landlord. Their interest, therefore, could not be affected by any decree to which they were not parties. It is the propriety of this decision that has been challenged before us in this second appeal.

We may say at the outset that the learned District Judge is somewhat inconsistent when he says that the decree in Rent Suit No. 4024 of 1933 had the effect of a rent decree, while he holds at the same time that neither the decree nor the execution sale were binding on the plaintiffs. If it was a rent decree proper, the entire holding would pass at the sale in execution of the decree, and the interest of the plaintiffs, if any, would stand extinguished by the sale. What the learned Judge probably meant was that the decree was not a money decree by reason of some of the recorded tenants being left out, as was contended on behalf of defendant No. 1. In his opinion, all the recorded tenants or their representatives were parties to the rent suit, and in this sense, it was a rent decree though according to him, the rent decree was of no avail against the present plaintiffs who had long before acquired the interest of tenants by adverse possession.

Now, in the present case, it is not disputed that the holding was not transferable by custom, and that on the transfer of the entire *jots* by the original tenant, the landlord became entitled to reenter the land at once. If the landlord does not take any steps to recover possession of the property and allows the transferee to remain in occupation of it for 12 years or more, the latter would acquire a limited interest of a tenant by adverse possession and the right of the landlord to recover ~~his~~ possession of the land would be barred by limitation, unless he can

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make out a case under section 18 of the Indian Limitation Act and prove that he was kept out of knowledge of his right to institute the suit by reason of any fraud committed by the defendant. Vide *Prabhakati Dassi v. Taibutunnessa* (1); and *Panchhari v. Maharaj Bahadur* (2).

Mr. Das argues before us that the transfer of a non-transferable holding by an occupancy *raiyyat* to somebody else does not by itself absolve the original tenant from his liability to pay rent to the landlord. The landlord instead of re-entering the land may avail himself of the alternative remedy to sue the original tenant for rent and the decree obtained in such a suit would be binding on the holding and a sale in execution of the decree would pass the entire holding to the purchaser free and clear of the interest of the unrecognised transferee. The last proposition is undoubtedly true so far as it goes, but the question still arises as to how long the landlord can go on suing the original tenant for rent after the latter has transferred the entire holding to a stranger. If the law laid down in the cases mentioned above, to wit, *Prabhakati Dassi v. Taibutunnessa* (1) and *Panchhari v. Maharaj Bahadur* (2), is correct,—and we have no doubt that it is so,—an unrecognised transferee would acquire by adverse possession the limited interest of a tenant against the landlord as soon as he has completed possession of the holding for a period of 12 years after his purchase. We cannot accept the view that the only effect of the acquisition of the occupancy right by the transferee would be that the landlord's right to sue him for *khaz* possession would be barred, but that it would be open to the landlord to proceed even then against the original tenant for recovery of rent of the holding. The law of limitation, in our opinion, would not only destroy the landlord's right to recover *khaz* possession of the holding, but it would create a corresponding right in the adverse possessor as well. The transferee whose possession was *prima facie* adverse to the landlord from the date of his purchase would acquire the status of a tenant in the full sense of the word, and although the landlord did not recognise him as a tenant, he would have all the rights of a tenant by operation of the statute of limitation in his favour. As a logical corollary, it would follow that after a nonrecognised transferee of nontransferable holding has acquired the limited

(1) (1913) 17 C. W. N. 1068.

(2) (1914) 19 C. W. N. 126.

interest of a tenant by adverse possession against the landlord, the latter cannot proceed against the original tenant for rent. The sale in execution of a decree obtained against the original tenant without making the transferee a party to the suit would not affect the rights which the latter has acquired by adverse possession.

The decision in *Kalap Choudhuri v. Sitab Chand* (1), upon which Mr. Das strongly relies is not exactly in point, and the particular question which arises for decision in the present case was not agitated and could not arise for decision in that case. In that case, the transfer of nontransferable holding was made in January, 1907, and the rent decree was obtained by the landlord against the old tenant in 1917. The transferee had, therefore, not acquired the limited interest of a tenant by adverse possession when the rent suit was brought or the rent decree obtained. In these circumstances, the learned Judges were perfectly right in holding that the sale in execution of the rent decree against the old tenant would pass the holding itself to the purchaser whether he be the landlord or a stranger, and the rights of the transferee in possession of the land would become adverse against the purchaser only from the date of the execution sale. On the other hand, we have an express decision of this Court in *Jatindra Nath v. Benode Behari* (2), which lays down that where the transferee of a nontransferable occupancy holding has acquired the title of a tenant by adverse possession of the limited interest, the transferor is not liable for rent.

In our opinion, on the facts of this case, the plaintiffs did acquire by adverse possession the limited interest of a tenant long before the rent suit was brought by defendant No. 1 or the rent decree was obtained by him against the recorded tenants. Their interest therefore could not be affected by the sale in execution of the decree obtained in the alleged rent suit.

The result is that we affirm the decision of the Courts below and dismiss this appeal. We make no order as to costs in this Court.

Sharpe, J. :—I agree.

A. T. M.

Appeal dismissed.

(1) (1932) L.L.R. 11 Pat. 798.

(2) (1919) 52 I. C. 289.

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*Before Mr Justice B. K. Mukherjee and Mr. Justice
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June, 19, 20.

PHANI BHUSAN MUKHERJEE AND OTHERS

v.

RAJENDRA NANDAN GOSWAMI AND ANOTHER.*

*Suit, maintainability of—Bengal Tenancy Act (VIII of 1885), sections 140A
147(2)—Recovery of arrears of darpatni rent—Code of Civil Procedure
(Act V of 1908), Order II rule 2—Separate suit for recovery of a portion
of claim arising out of same cause of action.*

In 1939 the plaintiff's predecessor sued defendant No. 1 only for recovery of Darpatni rents for the year 1343 even though the rents for the years 1343 and 1344 B. S. had already become due. The plaintiff thereafter sued the defendants Nos. 1 and 2 for arrears of darpatni rents for the years 1343 and 1344 B. S. and contended that as the tenants were jointly and severally liable and that as the defendant No. 2 was not a party in the previous rent suit, he was entitled to get a decree against the defendant No. 2. The Courts below dismissed the suit on the ground that a decree obtained against one of the joint promisors was a bar to a subsequent suit against others as enunciated in the rule in *King v. Heare* (1) :

Held, that the plaintiff was not entitled to claim rent against defendant No. 1, section 147 (2) of the Bengal Tenancy Act being applicable to a holding and not to a tenure. That the suit against defendant No. 2 was maintainable.

Query : How far the rule of law enunciated in *King v. Heare* (1) is applicable to this country in view of the express provision of section 43 of the Indian Contract Act.

Held, that the rule in *King v. Heare* (1) ; *Kendall v. Hamilton* (2) and *Brimmond v. Harrison* (3) does not apply in the present case whether the liability of the tenants be held to be joint or joint and several.

Hemendro Coomar Mullick v. Rajendralall Moonshee (4) ; *Gurusami Chetti v. Samurti Chinna Mannar Chetti* (5) ; *Shivlal Matilal v. Bridhichand Feroz* (6) ; *Muhammed Ashari v. Radhe Ram Singh* (7) ; *Miss Meselle*

*Appeal from Appellate Decree No. 1351 of 1941, against the decree of B. K. Guha Esq., District Judge of Zillah Burdwan, dated the 26th of May, 1941, affirming the decree of Tarapada Mukherjee Esq., Magistrate, 3rd Court, Burdwan, dated the 20th of December 1940.

(1) (1844) 13 M & W 294.

(2) (1879) L. R. 4 App. Cases 504.

(3) (1872) L. R. 7 C. P. 547.

(4) (1878) L. L. R. 3 Cal. 353 ; 1 C. L. R. 488.

(5) (1881) L. L. R. 5 Mad. 37.

(6) (1917) 19 Bom. L. R. 370.

(7) (1900) L. L. R. 29 All. 307.

Seleson v. Martin & Co. (1); *Niratan Mukhopadhyay v. The Cooch Behar Loan Office Ltd.*, (2); *Dhuput Singh v. Sham Seender Mitter* (3); *Kashinath Sen v. Satendra Nath Bhadra* (4) and *Mohendra Nath Bose v. Abinash Chandra Bose* (5) reviewed.

Jagan Mohan Sarker v. Brijendra Kumar Chakravarti (6) followed.

Order 2 rule 2 of the Code of Civil Procedure is not based upon the doctrine of merger. It enacts a special rule that if the plaintiff was able to claim a wider and much larger relief than that to which he limited his claim in the suit, and which arises out of the same cause of action he would not be entitled to recover the balance in a subsequent suit. To make the rule applicable, two things are essential: First, that the previous and the present suit must arise out of same cause of action, and, secondly, they must be between the same parties; *Bindo Bibi v. Ram Chandra* (7) referred to.

Held also, that as the claim for rent for the years 1343 and 1344 B. S. was not the subject matter of the earlier suit at all, the cause of action as against defendant No. 2, so far as this claim is concerned could not be merged in the previous judgment which therefore did not operate as a bar against him.

The plaintiff was barred in bringing the suit against defendant No. 1 under the said Order 2 rule 2 of the Code of Civil Procedure.

Ramanjulu Naidu v. Aravamudu (8) followed.

Appeal by the Plaintiff.

Suit for recovery of arrears of *darpatni* rent.

The material facts appear from the judgment.

Messrs. Hemendra Chandra Sen and Kshitish Chandra Ghatak for the Appellants.

Mr. Bhutnath Chatterjee for the Respondents.

The following judgments were delivered:

Mukherjee, J.—This appeal is on behalf of the plaintiff, and it arises out of a suit commenced by him in the Court of the Third Munsif at Burdwan for recovery of arrears of *darpatni* rents, from the defendants, for the years 1343 and 1344 B. S. Of the two defendants, defendant No. 2 did not contest the

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(1) (1934) 39 C. W. N. 461.

(2) (1940) 72 C. L. J. 148; 45 C. W. N. 113.

(3) (1875) I. L. R. 5 Cal. 291; 4 C. L. R. 501.

(4) (1910) 12 C. L. J. 642.

(5) (1923) 27 C. W. N. 521; 15 C. W. N. 191.

(6) (1925) I. L. R. 53 Cal. 197 (F.B.); 42 C. L. J. 232.

(7) (1919) I. L. R. 41 All. 583.

(8) (1909) I. L. R. 33 Mad. 317.

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suit, and the claim of the plaintiff was resisted by defendant No. 1 alone whose contentions were of a twofold character. The first contention was that there was a payment by this defendant of a sum of Rs. 49/7/- every year on behalf of the plaintiff by way of contribution to the *choukidari* funds, and he was entitled to deduct this amount from the annual rents payable. The second defence was that the plaintiff's suit was barred under the provisions of Order II, rule 2 of the Code of Civil Procedure. It was averred that in the year 1939, the plaintiff's predecessor brought a suit against defendant No. 1 claiming rent due in respect of the same *durputni*, and in this suit, rent was claimed only for the year 1342 B. S., although at the date when the suit was filed, rents for the years 1343 and 1344 B. S. had already become due. The plaintiff, it was said, having omitted to sue for a portion of the claim which arose out of the same cause of action, was not entitled to bring a separate suit for recovery of the balance under Order 2, rule 2 of the Code of Civil Procedure.

Both these contentions found favour with the learned Munsif who dismissed the plaintiff's suit. The decision of the Trial Judge was affirmed on appeal by the learned District Judge of Burdwan. The plaintiff has now come up on second appeal to this Court.

It is not disputed by Mr. Sen who appears for the appellant that a sum of Rs. 49/7/- was paid by defendant No. 1 every year as contribution to the *choukidari* funds, and consequently these payments should be deducted from the total amount payable which is Rs. 100 a year. Mr. Sen has also conceded that so far as defendant No. 1 is concerned, as he was a party to the previous suit, the bar under Order II, rule 2 of the Code of Civil Procedure would apply, and the plaintiff is no longer entitled to claim against him the rents for the years 1343 and 1344 B. S. Section 147(2) of the Bengal Tenancy Act, it is conceded, has no application to the facts of this case which is a suit for rent in respect of a tenure and not a holding.

Mr. Sen's contention, however, is that as defendant No. 2 was not a party to the previous rent suit and the liability of the tenants to pay rent is a joint and several liability, the courts below should have given the plaintiff a decree against defendant No. 2 for the rents due in respect of the *durputni*.

This contention which was put forward on behalf of the plaintiff in the Courts below was negatived by them on the ground that a decree obtained against one of the joint promisors was a bar to a subsequent suit against others on the principle enunciated

in the well known case of *King v. Hoare* (1), which has been followed by this Court in a series of decisions. The only point for our consideration in this appeal is whether the view taken by the Courts below is right.

It cannot be disputed that there is some conflict of judicial opinion on the point as to how far the rule of law enunciated in *King v. Hoare* (1), is applicable to this country in view of the express provision of section 43 of the Indian Contract Act. In *Hemendro Coomar Mullick v. Rajendrolall Moonshes* (2), it was held by Garth, C. J. and Markby, J. that section 43 of the Indian Contract Act had not the effect of making the liability of joint promisors joint and several and did not make inapplicable in India the rule of law laid down in *King v. Hoare* (1) and *Brinsmead v. Harrison* (3). The effect of section 43 of the Indian Contract Act, according to their Lordships, was merely to prevent one or some of the joint contractors who might be sued upon the debt to plead abatement of the suit on the ground that his or their co-contractors ought to be made parties defendants. This was a case in which a decree was obtained against one of several joint makers of a promissory note, and it was held that this was a bar to a subsequent suit against others. This decision was followed with approval by the Madras High Court in *Gurusami Chetti v. Samurti Chinna Mannar Chetti* (4).

The view taken by the Bombay High Court does not seem to be quite uniform. In *Shivlal Matilal v. Bridhichand Jivraj* (5), Macleod, J. reviewed all the cases on the point and agreed with the view taken in *Hemendro v. Rajendrolall* (2).

The Allahabad High Court in *Muhammad Achari v. Radhe Ram Singh* (6), took an entirely different view, and it was held by Strachey, C. J. and Banerji, J. that a judgment obtained amongst some of the joint mortgagors and remaining unsatisfied, was no bar to a second suit being brought against other mortgagors. It was pointed out by the learned Chief Justice in the course of his judgment that the theory that in the case of a joint contract, there is a single cause of action which can be sued on only once, depends upon the right of the joint debtors in England to have

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(1) (1844) 13 M & W 494.

(2) (1878) 1 L. R. 3 Cal. 353; 1 C. L. R. 488.

(3) (1872) L. R. 7 C. P. 547.

(4) (1881) 1 L. R. 5 Mad. 37.

(5) (1917) 19 Bom. L. R. 370.

(6) (1900) 1 L. R. 22 All. 307.

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all the contractors joined as parties to the suit on the contract. In India, such a right has been excluded by the express provision of section 43 of the Indian Contract Act, and consequently the foundation of the rule in *King v. Hoare* (1) has been taken away.

The question came up for consideration before this Court in two recent cases, but no final decision was given in either of them. In *Miss Mossile Solomon v. Martin & Co.* (2) Lord-Williams, J. agreed with the view taken in *Hemendro v. Rajendralall* (3), while Jack, J. was definitely of opinion that under section 43 of the Indian Contract Act, the liability of joint promisors being both joint and several, there was no question in India of any single cause of action. As, however, both the learned Judges agreed in allowing the appeal upon a different ground, there was no final pronouncement on this point. In the subsequent case of *Nilratan Mukhopadhyaya v. The Cooch Behar Loan Office Ltd.* (4), Mitter, J. reviewed the earlier authorities on the point, but as that was a case where the earlier judgment was passed by a foreign tribunal, the subsequent suit was held not to be barred, and it was unnecessary for the learned Judges to decide this matter finally.

We may say that there is much to be said against the extension of the rule in *King v. Hoare* (1) and *Kendall v. Hamilton* (5), to this country. It may be noted that Pollock and Mulla in their commentaries on the Indian Contract Act have given unqualified support to the view taken by the Allahabad High Court in *Muhammad Ashari v. Radhe Ram Singh* (6). In view of the conflict noticed above, the matter can be solved so far as this Court is concerned only by the pronouncement of a larger Bench. We do not think, however, that for the purpose of deciding this case the conflict of opinion is at all material.

Mr. Sen argues that as the liability of tenants to pay rent is a joint and several liability, the principle in *King v. Hoare* (1) is not applicable to the present case. The authorities undoubtedly show that where the obligation is not joint but joint and several, the doctrine of merger does not apply, and a judgment against

(1) (1844) 13 M & W 494.

(2) (1934) 39 C. W. N. 461.

(3) (1878) L. L. R. 3 Cal. 353; 1 C. L. R. 488.

(4) (1940) 72 C. L. J. 148; 45 C. W. N. 113.

(5) (1879) L. R. 4 A. C. 504.

(6) (1900) L. L. R. 28 All. 307.

one of the debtors, without satisfaction is no bar to a suit against others. See Leake on Contract, 8th Edition, pages 722-23. See also *Dhampur Sing v. Sham Soondar. Mitter* (1). The question now is whether the liability of the *darputnidars* to pay rent to the plaintiff is a joint and several liability in the present case. Under section 146(1) of the Bengal Tenancy Act, all the cosharers tenants in a tenure or holding have been made liable to the landlord jointly and severally for the rent payable to the landlord. If section 146(A) of the Bengal Tenancy Act applies to the present case, the liability of the defendants cannot but be joint and several.

A question may be raised, however, that as the contract of tenancy in this case came into existence much earlier than 1938 when section 146A was introduced, the liability of the parties ought to be determined according to the law as it existed under old Act. Under the old law, the judicial decisions on the point were not very clear and uniform. In *Kasikinkar Sen v. Satyendra Nath Bhadra* (2), it was held by Mookerjee and Sharfuddin, JJ., that when a landlord creates a tenancy in favour of two persons jointly, whether each is liable for the entire rent would depend upon the intention of the parties. The question whether a contract is joint or several or joint and several is a question of construction depending upon the intention of the parties to the contract. This position, it was said, was not affected by section 43 of the Indian Contract Act. This was a case, however, where on the death of the original tenant, the tenancy had devolved upon his heirs jointly, and it was held that the heirs really constituted one body and could not be treated necessarily as persons who made joint and several promise. So far as the original lessors are concerned, the majority of the decisions seem to be in favour of the view that their liability is joint and several unless there is anything to the contrary in the contract. It should be noticed that in the majority of these cases, reliance was placed in support of this position upon the provisions of section 43 of the Indian Contract Act itself. Vide *Mohendra Nath Bose v. Abinas Chandra Bose* (3). As there was a conflict of opinion on the question as to whether a rent suit could be instituted against some of the heirs of the original tenant, the matter was referred to the Full Bench,

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(1) (1879) I L. R. 5 Calc. 291; 4 C. L. R. 501.

(2) (1910) 12 C. L. J. 642.

(3) (1923) 27 C. W. N. 521.

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and the majority of the Judges constituting the Full Bench expressed the opinion that a suit against some of the heirs would be maintainable : *Jagan Mohan Sarkar v. Brojendra Kumar Chakrabarti* (1). It is true that the Full Bench did not say in so many words that the liability of the heirs of the original tenant is joint and several, but that seems to us to be the implication of that decision.

If we hold that the liability of the two tenants in this case to pay rent to the plaintiff was a joint and several liability, no difficulty arises at all, and we can say on the authority of the English decisions themselves that the rule in *King v. Hoare* (2), is not applicable to such cases. But even if we hold that the liability of the defendants was joint and not joint and several, still then we are of the opinion that the rule in *King v. Hoare* (2), is not attracted to the facts of this particular case. The foundation of the rule in *King v. Hoare* (2), and *Kendall v. Hamilton* (3), is that the cause of action in the case of joint contract being one, it is merged in the judgment, and no second suit against the other contractors can be brought upon it. Order II, rule 2 of the Code of Civil Procedure is, however, not based upon the doctrine of merger. It enacts a special rule that if the plaintiff was able to claim a wider and much larger relief than that to which he limited his claim in the suit, and which arises out of the same cause of action he would not be entitled to recover the balance in a subsequent suit. The object of the rule is to prevent the splitting up of the same cause of action and to prevent the same person or persons being vexed twice. To make the rule applicable, two things are essential : First, that the previous and the present suits must arise out of the same cause of action, and secondly, they must be between the same parties. Vide *Bindo Bibi v. Ram Chandra* (4).

So far as defendant No. 1 is concerned, it cannot be disputed that Order II, rule 2 of the Code of Civil Procedure operates as a complete bar to the present suit, but so far defendant No. 2 is concerned, Order II rule 2 is not directly applicable. The previous judgment can operate as a bar against him only if the cause

(1) (1925) I. L. R. 53 Calo. 197 F. B ; 42 C. L. J. 232.

(2) (1844) 13 M & W 494.

(3) (1879) L. R. 4 A. C. 504.

(4) (1919) I. L. R. 41 All. 588.

of action against him is merged in the judgment, but as the claim for rent for the years 1343 and 1344 B. S. was not the subject matter of the earlier suit at all, the cause of action as against defendant No. 2, so far as this claim is concerned, could not be merged in the judgment. This view is supported by the decision of a Division Bench of the Madras High Court in *Ramanjulu Naidu v. Aravamudan* (1). We may say that we are in entire agreement with the reasoning of the learned Judges, and agreeing with that view, we are of the opinion that the principle in *King v. Hoare* (2), does not apply to the facts of this case even if we assume for the sake of argument that the liability of the two defendants was a joint and not a joint and several liability.

The result, therefore, is that we allow this appeal, and modify the decree of the Lower Appellate Court. The plaintiff will have a decree against defendant No. 2 for the rent claimed by him after deducting the amount of Rs. 98/14/- which was admittedly paid by defendant No. 1. The plaintiff will have proportionate costs from defendant No. 2 in the Trial Court. There will be no order for costs in this Court as well as in the Lower Appellate Court.

Sharpe, J. :—I agree.

S. C. ; A. T. M.

*Appeal allowed :
Decree modified.*

(1) (1909) I. L. R. 33 Mad. 317.

(2) (1844) 13 M & W 424.

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Before Mr. Justice B. K. Mukherjee and Mr. Justice
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NRIPENDRA KUMAR ROY CHOUDHURY
AND ANOTHER

v.

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December, 13

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January, 16, 17

February, 1.

Decree, re-opening of—Bengal Money Lenders Act (X of 1940), section 36 (6) (a) (1)—Original obligation—Keeping alive in subsequent mortgages—New obligation, if created thereby and barring the application of proviso (1) of section 36(1)—Original mortgage beyond 12 years from the date of the suit, if can be re-opened for accounts for new decree—"Suit" in proviso (1) of section 36(1), meaning of—Indian Contract Act (IX of 1872), section 62.

Under section 36(1) of the Bengal Money Lenders Act, 1940, the Court, if it has reason to believe that the exercise of one or more of the powers under that section will give relief to the borrowers, shall *inter alia* re-open any transaction and take an account between the parties; and it can exercise these powers notwithstanding any agreement, purporting to close previous dealings and to create new obligations. Proviso (1) lays down that no adjustment or agreement, purporting to close previous dealings and create new obligations could be touched by the Court, if it was entered into at a date more than 12 years from the date of the suit by the parties or any person through whom they claim. It contemplates a case where the adjustment or agreement extinguishes the previous obligation and replaces it by another or substituted obligation, within the meaning of section 62 of the Indian Contract Act.

Whether a new mortgage bond under section 62 of the Indian Contract Act is to be taken in lieu of and in supersession of an old one depends entirely upon the intention of the parties and the intention is to be gathered from the facts and circumstances of each case.

Golubnath Misser v. Lalla Prem Lal (1) and *Gopal Chunder Sreemany v. Heramba Chunder Haldar* (2) referred to

When a renewed mortgage bond is taken, the mortgagee is always presumed, unless the contrary is shown to keep alive the original security which might be availed of against third parties. The presumption which arises in such circumstances can be put down expressly in the mortgage deed itself out of abundant caution.

* Appeals from Original Decree Nos. 73 and 122 of 1942, against the decree of B. B. Bhaduri, Esq., Subordinate Judge, 1st Court, Backerganj, dated the 11th day of November, 1941.

(1) (1877) I L. R. 3 Cal. 307.

(2) (1889) I. L. R. 16 Cal. 523.

Whether or not the original agreement was discharged by a new agreement as is contemplated by section 62 of the Indian Contract Act, must be determined on a consideration of the substance of the matter and not merely the form.

Kishore Nath Sirdar v. Messrs. Haraschdas Balkissen Das (1) referred to.

The word "suit" in the proviso (1) of section 36(1) of the Bengal Money Lenders Act, 1940, means either a suit to which the Act applies and in connection with which relief is claimed by the borrower under section 36(b) of the Bengal Money Lenders Act or it means a suit brought by the borrower as contemplated by section 36(1) itself.

Nrisinha Chandra Pal Choudhury v. Kenaklata Das (2) ; *Baidya Nath Dutta v. Mirtyunjoy Mukherjee* (3) followed.

Jagabandhu De v. Akshoy Kumar Sii (4) referred to.

In 1902 a mortgage deed was executed. In 1915 a second mortgage deed was executed in favour of the same mortgagee for a higher sum and the first mortgage was kept in force. There was no fresh advance on the second mortgage, but it was executed as a higher sum was found to be due after taking accounts. In 1928 a third mortgage was executed for a still higher sum and both the previous mortgages were kept alive. This time also there was no fresh advance of money but it was executed after taking accounts and the higher sum was found due. Then there was a suit for this mortgage and decrees were passed. In execution of the final decree the decree-holder purchased the mortgaged properties. The mortgagor thereafter started a proceeding under order 21 rule 90 Civil Procedure Code for setting aside the sale. During the proceeding the Bengal Money Lenders Act came into force. In September, 1940 the mortgagor presented an application for re-opening of the decree under section 35 (6) (a) (1) of the Bengal Money Lenders Act:

Held: There was no intent on of the parties that the original obligation should be extinguished and merged in a new obligation and the obligation under the second instrument was not in suppression of but only in addition to or modification of the obligation created by the first document. This being the position the case is not hit by proviso (1) to section 36(1) of the Bengal Money Lenders Act and the Court in giving relief under the Bengal Money Lenders Act is competent to re-open the second mortgage bond and direct accounts to be taken on the basis of the original loan. Proviso (1) is only an exception to the general rule embodied in the section and must be construed strictly.

Appeals both by the Judgment-debtor and Decree-holder.

Application for relief under section 35 (6) (a) (1) of the Bengal Money Lenders Act.

The material facts will appear from the judgments.

(1) (1926) 45 C. L. J. 233 ; 31 C. W. N. 703.

(2) (1942) 45 C. W. N. 457.

(3) (1942) 48 C. W. N. 504.

(4) (1942) 75 C. L. J. 485 ; 46 C. W. N. 906.

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Messrs. Fanchanon Ghose and Satyendra Chandra Sen for the Appellants in No. 73 and for the Respondents in No. 122.

Messrs. Atul Chandra Gupta and Surendra Nath Das Gupta for the Respondents in No. 73 and for the Appellants in No. 122.

C. A. V.

The following judgments were delivered:

February, 1.

Mukherjea, J.:—Both these connected appeals are directed against a new decree made after re-opening of an old mortgage decree, under section 36 of the Bengal Money Lenders Act. The judgment-debtors are the appellants in Appeal from Original Decree No. 73 of 1942, while the other appeal, which is Appeal from Original Decree No. 122 of 1942, has been preferred by the plaintiffs decree-holders.

The facts material for our present purposes are not in controversy and may be stated as follows:—

On July 21, 1902, Ananda Kumar Roy Chowdhury the predecessor of defendant No. 1 borrowed a sum of Rs. 15000 from the father of the plaintiffs on a mortgage of certain properties, and it was stipulated in the mortgage bond that the amount advanced would carry interest at the rate of 9 per cent per annum with yearly rests. A sum of Rs. 9600 was paid by the mortgagor towards his dues on the mortgage in different instalments between July 21, 1902 and August 10, 1915 when a renewed mortgage bond was executed by the debtor for a sum of Rs. 28,500. There was no fresh advance on this mortgage and it was recited in the mortgage bond that accounts being taken it was found that a sum of Rs. 30,423-11 as. was still due on the first mortgage; and the mortgagee having remitted a sum of Rs. 1923-11 as. the renewed bond was executed for the balance of Rs. 28,500. Certain additional properties were kept as security for payment of this money and it was further stated in paragraph 7 of the mortgage instrument that the previous mortgage would remain in force. The stipulation for interest in the second mortgage was exactly the same as in the first. After the second mortgage was executed the mortgagor paid several sums of money to the creditor from time to time aggregating to Rs. 10,291 and on April, 12, 1928, a third mortgage was executed by the debtor for a consideration of Rs. 65,000. Here again there was no fresh advance and the recitals in the mortgage bond show that the amount due by the

debtor had come up to Rs. 65,568 and odd after deducting the sum of Rs. 10,291 paid by him, and the creditor having granted a remission of Rs. 578 annas odd the third mortgage was executed for the consideration of Rs. 65,000. Here also the stipulation was to pay interest at the rate of 9 per cent per annum with yearly rests and both the previous mortgages were kept alive.

Admittedly no payment was made by the mortgagor after the execution of the third mortgage; and on February 15, 1932, the mortgagee brought a suit in the Court of the Subordinate Judge of Barisal for recovery of a sum of Rs. 99,073 on the basis of the third mortgage bond. A preliminary decree was passed in that suit on May, 7, 1934 and on March 25, 1935, the decree was made final. The decree-holder put the decree into execution in Title Execution Case No. 10 of 1936, and a sum of Rs. 4600, which was lying in the Collectorate to the credit of the mortgagor as the surplus sale proceeds of one of the mortgaged properties, sold for arrears of revenue, was realised in course of this execution proceeding. The mortgaged properties were then put up to sale and they were purchased by the decree-holder for a sum of Rs. 1,31,623. There was a proceeding started by the judgment-debtor for setting aside the sale under Order XXI, rule 90 of the Code of Civil Procedure and pending this proceeding the Bengal Money Lenders Act came into force.

On September 11, 1940, the judgment-debtor presented an application for re-opening of the decree under section 36 (6) (a) (1) of the Bengal Money Lenders Act. The decree-holder filed objections and the Court on hearing the parties held that the decree was liable to be re-opened. It was directed that the third mortgage bond should be re-opened as it was within twelve years from the date of the suit as contemplated by proviso (1) to section 36(1) of the Bengal Money Lenders Act, and accounts should be taken on the basis of the second mortgage—the amount of loan being taken to be Rs. 28,500 as stated in the instrument. The Court refused to re-open the second mortgage inasmuch as it was beyond twelve years from the date of the mortgage suit. On the basis of this decision a new preliminary decree was passed on November 11, 1941. It is against this decree that these two appeals have been taken to this Court, one of them being filed by the judgment-debtors and the other by the decree-holders.

Appeal from Original Decree No. 73 of 1942.

We will take up first the appeal preferred by the judgment-debtors, which is appeal from Original Decree No. 73 of 1942.

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Mr. Panchanan Ghosh, who appears in support of this appeal, has argued before us that the Court below in re-opening the decree should have re-opened the second mortgage bond also and directed accounts to be taken on the basis of the first mortgage, inasmuch as proviso (1) to section 36(1) of the Bengal Money Lenders Act is not attracted to a case like this where the renewed mortgage bond did not create a new obligation in supersession of the obligation created by the previous mortgage.

Now under section 36(1) of the Bengal Money Lenders Act, the Court, if it has reason to believe that the exercise of one or more of the powers under that section will give relief to the borrowers, shall *inter alia* re-open any transaction and take an account between the parties; and it can exercise these powers notwithstanding any agreement, purporting to close previous dealings and to create new obligations. Upon this general provision an exception has been engrafted by proviso (1), which lays down that no adjustment or agreement, purporting to close previous dealings and create new obligations could be touched by the Court, if it was entered into at a date more than twelve years from the date of the suit by the parties or any person through whom they claim. The language used by the Legislature undoubtedly contemplates a case where the adjustment or agreement extinguishes the previous obligation and replaces it by another or substituted obligation, within the meaning of section 62 of the Indian Contract Act. The whole contention, therefore, centres round the point whether the second mortgage in the present case rescinded or discharged the obligation created by the first and created a new obligation, which would bring it within proviso (1) to section 36(1) of the Bengal Money Lenders Act.

It seems to us to be settled law that whether a new mortgage bond is to be taken in lieu of and in supersession of an old one depends entirely upon the intention of the parties and the intention is to be gathered from the facts and circumstances of each case. It was held by a Division Bench of this Court in *Goluknath Misser v. La'la Prem Lal* (1) that when a later mortgage is created for the purpose of giving fresh security in consequence of the original debt having increased by arrears of unpaid interest, it cannot normally be taken to be a substitution for the earlier mortgage within the meaning of section 62 of the Indian Contract Act. The same view was taken in *Gopal Chunder Sreemany v. Herambo Chunder Holdar* (2). In that case a later mortgage recited an earlier mortgage and a

(1) (1877) I. L. R. 3 Calo. 307.

(2) (1889) I. L. R. 16 Calo. 523.

further loan advanced by the creditor and contained the following clause: "In order to liquidate the said debt, and on account of other necessities of ours, we three brothers do this day mortgage to you whatever right, title and interest we three brothers have in the said two properties and take the loan of Rs. 3,400; out of this money we have also liquidated the said debt." The earlier mortgage was never paid off, and it remained uncanceled, in the hands of the mortgagee. It was held that the later transaction did not amount to payment of the original debt, but was in reality a further advance and a fresh security for the old debt and the fresh advance, the old debt remaining unchanged. It was further held that even if the original debt had been satisfied by the later document, that fact would not necessarily destroy the security, the presumption being that unless an intention to the contrary was shown, the mortgagee intended to keep the security alive for his own benefit.

It is quite true that in both these cases the debtor had created an intermediate mortgage in favour of a third party, and the question for determination by the Court was whether the earlier mortgagee would lose his priority as against the subsequent encumbrancer by taking a fresh mortgage for the original loan after the intermediate encumbrance was created.

Mr. Gupta argues that a distinction has got to be drawn between keeping alive a debt and keeping alive the security for the debt; and even if the debt is discharged the security may be kept alive to be used as a shield against an intermediate security holder. Conceding that this distinction exists, it does not in our opinion follow that in case a renewed mortgage is taken for an old loan it necessarily extinguishes the old debt and creates a new one. In both the cases mentioned above the learned Judges held definitely that in the circumstances of those cases there was no substitution of a new obligation for the old within the meaning of section 62 of the Indian Contract Act. This means that the earlier obligation was kept intact as between the contracting parties themselves and not merely for protecting the interest of the mortgagee against an intermediate encumbrancer. In *Gopal Chandra Sreemany v. Heramb Chandra Halder* (1) referred to above, not only a fresh advance was taken and the stipulation as to interest was varied but the later mortgage bond contained a recital of the payment of the original debt. In spite of these recitals it was held by this Court that the original debt was not extinguished. It was alternatively found that even if the original

(1) (1839) 1 L. R. 16 Cal. 523.

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debt was superseded, the security was not destroyed but remained in force. It goes without saying that when a renewed mortgage bond is taken the mortgagee is always presumed, unless the contrary is shown, to keep alive the original security which might be availed of against third parties. We agree with Mr. Gupta that the presumption which arises in such circumstances can be put down expressly in the mortgage deed itself out of abundant caution. By itself a clause like this does not necessarily lead to the conclusion that not merely the security but the old obligation also was kept alive. But at the same time it cannot be contended that when a clause like this occurs in a mortgage bond the intention was only to keep alive the security and not the debt. As has been said already, the whole question was not of fact, and whether or not the original agreement was discharged by a new agreement, as is contemplated by section 62 of the Indian Contract Act, must be determined on a consideration of the substance of the matter and not merely the form. (*Vide Kshetranath Sirdar v. Harasvddas Bal Kissenadas* (1).

In the case before us we find that the consideration for the second mortgage was the amount due as principal and unpaid interest on the previous bond less a slight remission allowed by the mortgagee. The rate of interest in the new bond remained the same, and as the debt even after deducting the payments made by the borrower had amounted nearly to double of the original amount, the creditor insisted on adding certain fresh properties as security in the second mortgage bond. The document is described to be a renewed mortgage bond; and not only there was an express provision in the document that the first mortgage was to remain in force the first mortgage was not cancelled or returned to the mortgagor, but was kept with the mortgagee and filed along with other documents in the mortgage suit. From these circumstances it seems to us that a conclusion can fairly be drawn that there was no intention of the parties that the original obligation should be extinguished and merged in a new obligation and that the obligation under the second instrument was not in supersession of, but only in addition to, or modification of the obligation created by the first document.

This being the position we are clearly of opinion that the present case is not hit by proviso (i) to section 36(1) of the Bengal Money Lenders Act, and the Court in giving relief under the Bengal Money Lenders Act is competent to reopen the

second mortgage bond and direct accounts to be taken on the basis of the original loan. We only desire to observe that proviso (i) is only an exception to the general rule that is embodied in the section which empowers the Court to reopen all agreement and adjustments, which purport to close previous dealings, but which in reality are mere devices to swell the amount of the original debt by converting arrears of interest into principal, and must be construed strictly.

The result is that this appeal is allowed, the judgment and decree made by the court below are set aside and the matter is sent back in order that a new decree may be passed in accordance with the directions given above on the basis of the first mortgage bond, which was executed on July 21, 1902.

The appellants will be entitled to the costs of this appeal. Hearing fee five gold mohurs.

Appeal from Original Decree No. 122 of 1942.

We now come to the other appeal (Appeal from Original Decree No. 122 of 1942) which has been preferred by the creditors.

Mr. Gupta with his usual fairness represented to us at the outset that he would not press the appeal, but later on when the hearing of the other appeal was concluded he stated that his client had instructed him specifically not to abandon the appeal and therefore he would argue it for what it was worth.

The point taken in this appeal is that the Court below was not competent to touch even the last or the third mortgage which was executed more than twelve years from the date of the presentation of the application by the debtor under section 36(6) (a) (1) of the Bengal Money Lenders Act. It is contended that proviso (i) of section 36(1) of the Bengal Money Lenders Act would directly govern the case and the Court was not entitled to reopen the decree at all. In our opinion this contention cannot succeed.

In the first place we have held already in the other appeal that the renewed mortgage bond in the present case did not create any new obligation in supersession of the previous obligation and consequently would not attract the operation of the proviso at all. In the second place we think that even if the third mortgage created a new obligation and closed the previous transactions, it was admittedly within twelve years from the date of the mortgage suit.

The appellant's argument is that although it was within twelve years from the date of the mortgage suit, it was beyond twelve

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years from the date of the presentation of the application under section 36(6) (a) (i) of the Bengal Money Lenders Act, and we are invited to hold that the expression "date of the suit" occurring in proviso (i) to section 36(1) refers not merely to a suit instituted under that section but applies to an application also when it is made in course of execution proceedings. We are unable to accept this argument as sound. The word "suit" in the proviso means either a suit to which the Act applies and in connection with which relief is claimed by the borrower under section 36(6) of the Bengal Money Lenders Act, or it means a suit brought by the borrower as contemplated by section 36(1) itself. In *Nrisinha Chandra Pal Choudhury v. Sw. Kanaklata Das* (1) it was held that the date of suit in proviso (i) of cl. (1) of section 36 of the Bengal Money Lenders Act, refers to the date when the suit contemplated by section 35, cl. (1) is brought and not the date of any application by the borrower for relief under the Bengal Money-Lenders Act. The same view was taken in *Baidyanath Dutta v. Mrityunjoy Mukherjee* (2). It was definitely held in the latter decision that the expression "suit" cannot possibly refer to the petition for execution of the decree made in the suit in course of which the relief is claimed for, but must refer to the date of the institution of the suit itself where the decree under execution was passed. On the last point a difference of opinion was expressed by Roxburgh and Akram JJ. in *Jagabandhu Das v. Akshoy Kumar Sil* (3) and it was held by the learned Judges that when relief is claimed in execution proceeding the date of suit mentioned in proviso (i) to section 36, cl. (1) of the Bengal Money Lenders Act means the date of starting the execution proceeding and not the original suit in which the decree was passed. Assuming that this decision is correct, it would not be of any assistance to the present decree-holders, for the third mortgage in the present case was admittedly within twelve years from the date of the commencement of the execution proceeding.

Mr. Gupta frankly conceded that the decided cases are all against him and having regard to the language of the section we have no hesitation in holding that these decisions are correct. A relief can be obtained under the Bengal Money Lenders Act either by a suit under section 36(1) or by an application in an execution proceeding, or by way of a review of the decree passed in the suit.

(1) (1942) 46 C. W. N. 457.

(2) (1942) 48 C. W. N. 504.

(3) (1942) 75 C. L. J. 485; 46 C. W. N. 906.

The distinction between a suit and an application is maintained in the section itself, and we cannot say that the Legislature intended that the word "suit" in the proviso should include an application also.

The result is that the decision on this point as made by the court below seems to us to be right, and we dismiss this appeal with costs. Hearing fee five gold mohurs.

Blank J :—I agree.

M. A. K ; A. T. M.

*Appeal No. 73 of 1943 allowed.
Appeal No. 122 of 1942 dismissed.*

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Before Mr. Justice P. Chakravartti.

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January, 24.

Second appeal—If lies—Lease, construction of—Provision of payment of rent by paddy or a sum of money in lieu thereof—Same point decided in previous rent suit, if res judicata—Bengal Tenancy Act (VIII of 1875), section 153—Payment of sum of money in lieu of paddy, if involves "a question of the amount of rent annually payable by a tenant".

The dispute in the present case was what amount was payable by the tenant under the terms of the lease in case he failed to pay the rent in kind within the relevant year. The contention of one party was that the amount payable would be the paddy's worth according to current price while the contention of the other party was that the amount payable was a fixed sum. The question therefore was, what was the alternative amount of rent payable?

Held, that the real question, on a contention of this kind, was to see not what the strict rights of the parties are under the agreement between them, but what precise question was raised before the Court.

*Appeal from Appellate Decree No. 1640 of 1942, against the decree of S. Ahmed, Esq., Additional Subordinate Judge of Zilla Khulna, dated the 13th July, 1942, reversing the decree of P. Basu Esq., Munsiff, 1st Court, Khulna, dated the 26th March, 1942.

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The question which was put in issue (in the previous rent suit) was a question relating to the effect of the lease, that was a question which would be equally applicable to all years, and could not have any special meaning or any special limitations so far as any particular year was concerned. It was the basic question of the tenant's true liability under the lease, in no way dependent on any accidental circumstances of the claim made in the suit; and the question was raised so directly and the decision is so definite that it operates as *res judicata* in the present suit.

A question as to the amount of rent payable in money in default of the payment in kind being "a question of the amount of rent annually payable by a tenant" a second appeal lies to the High Court.

When the Court below applied itself to the real effect of the alternative provision regarding payment in money and said that the amount mentioned in the lease could not be considered to be the rent of the tenancy:

Held, that this involved a decision as to what the amount of rent annually payable.

When the Court below held that if payment for a year was not made within the year, the landlord would be entitled to recover only Rs. 33-12-2 as the equivalent of annual rent: *Held*, that the Court below substantially decided a question as to the amount of rent annually payable.

Hamid Ali v. Ram Kumar Peddar (1) followed.

Appeal by the Plaintiff.

Suit for recovery of rent for the year 1344 B. S. on the basis of a lease.

The material facts appear from the judgment.

Messrs. Gopendra Nath Das and Manindra Nath Ghose for the Appellant.

Mr. Profulla Kumar Chatterjee for the appearing Respondent (Defendant No. 2).

The following judgment was delivered:

January, 24.

Chakravartti, J. :—This appeal is on behalf of the plaintiff and arises out of a suit for recovery of rent for the year 1344 B. S. on the basis of a lease granted to the predecessor of the defendants on the 27th of Chaitra, 1293. The plaintiff laid his claim at the rate of 6 *Salis* and 15 *Palis* of paddy which, according to him, was the rent annually payable, but the actual claim made was for a sum of money in lieu of the rent in kind, calculated at Rs. 7 per *Sali* on the basis that that was the then market price of paddy. The defence was that in case the rent was not paid in kind no market price was payable, but the plaintiff would be entitled to recover only a sum of Rs. 33/12-2 for each year as fixed

(1) (1921) 62 L. C. 639.

in the lease. A second defence was that in any event the market price for the relevant year was not Rs. 7 per Sali but Rs. 5.

The plaintiff based his claim substantially on two grounds. In the first place he contended that on a proper construction of the lease which was Exhibit A in the case, it ought to be held that the parties intended the market price of the paddy to be paid, in case the rent was not paid in kind. It was contended in the next place that in any event this question was barred by *res judicata* by reason of a previous decision in rent suit No. 294 of 1940 where this identical question had been raised and decided.

The trial court held in favour of the plaintiff on both the contentions and decreed the suit at the rate claimed. The court held, on a construction of the lease, although it did not deal with the matter very fully, that the document provided for market price. It also held that the previous decree operated as *res judicata*.

On appeal this decision was reversed on both the points. The learned Judge held that the effect of the previous decree was limited to the claim for the year which was in litigation in the previous suit and could not operate as *res judicata* with respect to the claim for any future year. With regard to the effect of the lease itself, he held that the parties intended the quantity of paddy mentioned to be the rent payable and further stipulated that in case the paddy rent was not paid in time, the lessor would be entitled only to the fixed sum of Rs. 33/12 as the equivalent of the paddy rent. On these findings the learned Judge decreed the suit in part in accordance with his view of the terms of the lease.

Thereupon the present second appeal was preferred by the plaintiff.

A preliminary objection was taken on behalf of the appearing respondent who, I may state, is defendant No. 2 in the suit. It was contended that the suit was one for rent and valued only at Rs. 57/9. The decision appealed from was decision of a Subordinate Judge and therefore, having regard to the provisions of section 153 of the Bengal Tenancy Act, no second appeal lay, inasmuch as the learned Judge had decided none of the questions mentioned in the proviso to sub-clause (5) of that section.

The argument in support of the preliminary objection was put before me in the following manner. It was that under the Bengal Tenancy Act that rent meant whatever was lawfully payable or deliverable in money or kind by a tenant to the landlord

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on account of the use or occupation of the land held by him. Reference was next made to the terms of section 153 and it was contended that the only one of the exceptions under which the present case could possibly come was that contained in the last clause of the proviso, viz., "a question of the amount of rent annually payable by a tenant". On these provisions it was contended that there was no dispute in the present case as regards the amount of rent annually payable which, according to both parties, was 6 *Salis* 15 *Palis* of paddy. The only dispute was with regard to the amount paid in case a default occurred in payment of the rent; but that amount, it was contended, could not be said to be rent as the term was understood in the Bengal Tenancy Act. It was only a sum of money in the nature of penalty; or it might be the variable equivalent of the rent in kind; in no case could it be said to be the rent annually payable.

I am not prepared to give effect to this contention. It seems to me that the real question, on a contention of this kind, is to see not what the strict rights of the parties are under the engagement between them, but what precise question was raised before the court below and what it actually decided. The dispute in the present case, in my view, was what amount was payable by the tenant under the terms of the lease in case he failed to pay the rent in kind within the relevant year. The contention of one party was that the amount payable could be the paddy's worth according to current price while the contention of the other party was that the amount payable was a fixed sum. On these contentions the question which arose and fell to be decided was, in my view, what amount was payable to satisfy the landlord's claim for rent in cases where the principal mode of payment, viz., payment in kind was not complied with; in other words, what was the alternative amount of rent payable?

Turning next to the other part of the question, viz., what the learned Judge has actually decided, it will appear from his judgment that he has decided several things. In the first place he has applied himself to the real effect of the alternative provision regarding payment in money and has said that the amount mentioned in the lease cannot be considered to be the rent of the tenancy. This, in my view, involves a decision as to what the amount of rent annually payable is not. All that we are concerned with is a decision and it is immaterial whether the decision is of a positive or a negative character.

In the second place, the learned Judge has held that if payment for a year was not made within the year, the landlord would be entitled to recover only Rs. 33/12 as the equivalent of the annual rent. It was contended that this was a finding as to what was 'recoverable' by the landlord and not a finding as to the amount of rent annually payable by the tenant. This argument, in my view, overlooks the fact that what is recoverable by the landlord is payable by the tenant; and since the learned Judge was deciding a general question as to what the measure of the alternative liability of the tenant would be, in my view, here too, he was deciding substantially a question as to the amount of rent annually payable.

I am fortified in the view which I am taking by an observation contained in a judgment delivered by a Division Bench of this Court and reported viz. *Hamidali v. Ram Kumar Poddar* (1). It is true that the question did not call for decision in the case inasmuch as the claim exceeded the amount of Rs. 100, but an expression of opinion was recorded by the court and I may usefully refer to the proposition stated. It was observed that "a question as to the amount payable in money in default of the payment of rent in kind is a question of the amount of rent annually payable by a tenant within the meaning of section 133 of the Bengal Tenancy Act". With that view I respectfully agree.

I am, therefore, of opinion that the preliminary objection must be overruled.

In view of the previous rent decree, it seems to me unnecessary to decide in this appeal the dispute between the parties as to terms of the lease. Cases of this type are quite familiar to courts of law and must ultimately be decided on the language of the relevant document, taken as a whole, which perhaps is not always very easy to construe. In the present case, however, that task need not be undertaken because the matter was decided in a previous litigation between the parties. The decree upon which the plaintiffs rely was, as I have stated, passed in Rent Suit No. 294 of 1940. The claim in that suit was a claim for the market value of the paddy rent for the year 1343 B. S.; and it appears from a reference to the judgment passed that the identical

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question, put in issue in the present case, was raised there as well. In the course of the judgment the learned Munsiff who decided that case observed as follows :

"The only defence which was pressed at the time of trial is that the plaintiff cannot get the price of paddy at the market rate. In accordance with the terms of those documents the plaintiff can only claim Rs 33-12 which is the price stated there."

The question which arose for consideration on that defence was stated by the learned Munsiff to be "whether the plaintiff is entitled to claim the amount of paddy at the prevailing market rate." His decision was that on the terms of the lease the plaintiff was entitled to claim the market price. He referred *inter alia* to the circumstance that the lease was a *mokurari* lease and observed that if the lessor was letting out the land at a fixed rent in kind, it was inconceivable that he was at the same time taking the risk of a fall in prices by agreeing to a fixed equivalent in money for all time.

The learned Judge has dismissed this judgment and decreed with the observation that it operated only as to the claim of the particular year for which rent was being claimed in that suit; and it is stated, by way of the reason for this view, that the cause of action for rent recurred from year to year. I do not see how the decision, in the previous case can be said to be limited to the claim for any particular year. The question which was put in issue was a question relating to the effect of the lease and surely that was a question which would be equally applicable to all years, and could not have any special meaning or any special limitations, so far as any particular year was concerned. It was the basic question of the tenants' true liability under the lease, in no way dependant on any accidental circumstances of the claim made in that suit. Again, the question was raised so directly and the decision is so definite that it seems to me to be beyond argument that it must operate as *res judicata*. I am of opinion, therefore, that the defendants in the present suit are bound by the interpretation of the lease contained in the judgment in Rent Suit No. 294 of 1940 which they invited and suffered and they are liable to pay the plaintiff the market price of the paddy in case of default in payment in kind, as held in that judgment.

In view of what I have said above it is unnecessary for me to consider, on my own account, the effect of the Potta of 1293.

The result is that the appeal is allowed, the judgment and decree of the lower appellate court are set aside and those of the learned Munsiff restored. The appellant will have his costs in this court and in the lower appellate court from the appearing respondent.

Leave to appeal under clause 15 of the Letters Patent has been asked for. It is refused.

S. C.

Appeal allowed.

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v.
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*Before Mr. Justice B. K. Mukherjee and Mr.
Justice W. Mac C. Sharpe.*

AMIYA PROVA DAS

v.

JYOTI PROKASH GHOSH.*

Civil.

1946.

February, 20,
March, 6.

Appeal, if lies—Civil Procedure Code (Act V of 1908), section 47—Claim by wife under Order 21 rule 58—Death of husband—Wife became the representative—Leave to sue granted under section 12 of the Letters Patent—Revocation of grant, when to be made—Propriety of grant challenged.

A handnote was executed and the consideration paid in Mymensingh where the defendants live. The obligee subsequently assigned the handnote to his son in Calcutta. Later on the son obtained a decree upon the handnote in the Original Side of the High Court which he sought to execute in Mymensingh. The judgment-debtor objected to the execution of the decree on the ground that it was passed without jurisdiction. His wife also made a claim under Order 21 rule 58 of the Code of Civil Procedure with regard to some items of property. During these proceedings the judgment-debtor died leaving his wife :

Held, that the decision regarding the claim of the wife which was made at a time when she had by the death of her husband become the representative of the judgment-debtor, was a decision under section 47 of the Code of Civil Procedure. The appeal was, therefore, competent and not barred under the provision of Order 21 rule 63 of the Code of Civil Procedure.

*Appeals from Original Orders Nos. 4 and 5 of 1945, against the Order of C. C. Basu, Esq., Subordinate Judge of Zillah Mymensingh, 3rd Court, dated 3rd July, 1944, in Misc. Case Nos. 2 and 4 of 1944.

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Panchanan Bandyopadhyay v. Rabia Bibi (1) followed.

Assignment of the decree in Calcutta constituted a part of the cause of action and there would be no want of jurisdiction if leave to sue in the Original Side of the High Court was obtained.

Prima facie the Court has jurisdiction unless absence of jurisdiction is apparent on the face of the record.

Where leave has been granted under section 12 of the Letters Patent and where the propriety of the grant is challenged, the proper course is for the defendant to apply at the earliest opportunity for revocation of the grant.

Kalsorem v. Foxistha (2); *Daulatram v. Maharajlal* (3); *Harnathrai v. Sew Prosad* (4) and *Radhika Mohan v. Bhobani* (5) followed.

Appeal by the Judgment debtor.

Application by the judgment-debtor under section 47 and claim by his wife under Order 21 rule 58 of the Code of Civil Procedure.

The material facts will appear from the judgments.

Messrs. Rajendra Bhushan Baksi and *Siva Kali Bagehi* for the Appellant.

Messrs. Birendra Kumar De and *Satya Prosad Banerjee* for the Respondent.

C. A. V.

The following judgments were delivered :

March, 6.

Sharpe, J. :—These two appeals arise out of proceedings in execution of a decree obtained by the respondent against Sarat Chandra Das, husband of the appellant, Amiya Prova Das, and others, on 30th May, 1941 in Suit No. 1840 of 1940 in the Original Side of this Court. The claim in that suit was based on a hand-note executed by Sarat Das and others in favour of the father of the respondent, in Mymensingh. It was subsequently assigned to his son, the present respondent, in Calcutta. The decree was transferred to the District of Mymensingh for execution in March, 1943 and the decree-holder prayed for attachment and sale of eleven lots of property. The judgment-debtor, Sarat Das, preferred an objection under section 47 Civil Procedure Code to the execution on the

(1) (1890) I. L. R. 17 Calc. 711 (F. B.)

(2) (1935) 40 C. W. N. 161.

(3) (1935) 40 C. W. N. 164.

(4) (1935) 40 C. W. N. 165.

(5) (1936) 40 C. W. N. 717.

ground that the decree was made without jurisdiction. The appellant, Amiya Das, preferred a claim under the provision of order 21, rule 58 Civil Procedure Code to lot No. 4, a holding in village Dhamsur with the structures thereon described separately as lot No. 8, and to lot No. 6, a holding in village Mallikbari with the structures thereon described separately as lot No. 7.

Miscellaneous cases were started on account of this objection and claim. Judgment-debtor, Sarat Das, died during the pendency of these cases and the appellant Amiya Das, who was his only heir, was brought on the record as his representative. Both cases were heard together and were dismissed. The learned Subordinate Judge held that the objection under section 47 Civil Procedure Code could not be sustained since there was nothing on the face of the record to show that the decree was made without jurisdiction, and after consideration of the evidence he came to the conclusion that lots Nos. 4 and 8 of village Dhamsur and lots Nos. 6 and 7 of village Mallikbari belonged to the judgment-debtor, Sarat Das, and were in his possession up to the time of his death. Amiya Das has now appealed against these decisions.

A preliminary objection was taken by Mr. De for the respondent with regard to the competency of Misc. Appeal No. 4, which is directed against the decision in respect of the appellant's claim made originally under Order 21 rule 58 Civil Procedure Code. His contention is that by reason of the provisions of Order 21 rule 63 no appeal lies against the order rejecting the claim. Having regard however to the principles laid down in the Full Bench decision, *Punchann Bundopadhyaya v. Rabia Bibi* (1), we are of opinion that the decision regarding the claim of Amiya Das which was made at a time when she had by the death of her husband become the representative of the judgment-debtor, was a decision under section 47 of the Code of Civil Procedure. It is true, as pointed out by Mr. De, that some distinction may be made between the facts of the case which led to the Full Bench decision referred to above and the present one, in which the wife of the judgment-debtor preferred her claim before she became his representative, but we think that fact makes no difference in principle and we are satisfied that the decision against which Misc. Appeal No. 4 has been preferred is clearly on a question "arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution,

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discharge or satisfaction of the decree". In our opinion therefore, the appeal is competent.

On the merits, we think the appellant is entitled to succeed so far as the Mallikbari property is concerned. Amiya Das claimed that property by virtue of a settlement from the landlord on payment of Rs. 210 as Nazar, after the holding had been sold in auction in execution of a decree for arrears of rent and purchased by the landlord. That the holding was sold for arrears of rent, purchased by the landlord and settled in the name of Amiya Das is not disputed. The onus was therefore on the decree-holder to prove that this was a benami transaction. No evidence was however adduced in support of such a contention. On the other hand, evidence of settlement with the appellant has been given by the appellant herself and by her witnesses Nos. 1, 2 and 7. These witnesses have given evidence also of payment by her of the Nazar of Rs. 210. P. W's 1 and 2 may have some reason for deposing in the appellant's favour but we can find no reason to distrust the evidence of P. W. 7.

The learned Subordinate Judge based his decision regarding the benami nature of the transaction mainly on inference drawn from the fact that the judgment-debtor allowed this property to be sold for arrears of rent at a time when he was in financial difficulties and when the attachment and sale of his property in execution of decree was not unlikely. In the absence of any evidence for the decree-holder and in view of the positive evidence on the side of the appellant, we do not think such inferences were at all sufficient to justify the conclusion that the transaction was a benami one. There was nothing inherently improbable in the judgment-debtor being unable to pay the arrears of rent, and there could certainly have been no guarantee that the property if put up to sale would be purchased by the landlord and settled with the judgment debtor's wife. There is absolutely no evidence of any collusion between the landlord and the appellant in this matter or of the inability of the appellant to pay the sum of Rs. 210 as Nazar. We have no hesitation therefore in holding that her claim to the Mallikbari holding has been established.

With regard to the structure on the Mallikbari property, Amiya Das and her witnesses 1, 2 and 5 have deposed that these were erected at her cost and that she was in a position to pay such a sum; and there is no evidence to rebut the testimony of the appellant and her witnesses on these points. The amount said to have been spent on these structures is between Rs. 300 to

Rs. 500, and in the absence of any evidence to the contrary, we cannot say that the appellant had not the means to pay this amount. It is moreover common ground that the original buildings on the Mallikbari property were dismantled and the materials removed, and in view of the settlement of the Mallikbari with Amiya Das, there seems to us nothing improbable in the erection of the new buildings on the property at her cost. In consideration of the evidence and facts as a whole, we are of opinion that her claim to these structures has also been established.

The position with regard to the Dhamsur property is however different. It is the case for the appellant that this holding was settled with her in korsha right by her husband. No lease was granted and the only documentary evidence in support of the alleged settlement consists of three dakhilas which have neither been signed by Sarat Das nor proved by his officer Chandi Kumar Nandi by whom they purport to have been granted. The transaction is certainly suspicious in nature, and the onus was clearly on the appellant to prove the settlement and the erection of the structures at her cost. Apart from her own statement, evidence of the korsha settlement has been given only by her uncle-in-law, Rajendra Sarkar, P. W. 1 and by Aftabuddin Choudhury P. W. 2, Rajendra Chakravarty, P. W. 3 and Rajani Kanta Sarkar, P. W. 4. Aftabuddin Choudhury and Rajendra Chakravarty were close friends of Sarat Das or his father, and so likely to support the appellant, whilst Rajani Kant's admission that he did not know that Sarat Das had any right in the Dhamsur property, and his contradictory statements about the year and place of the alleged settlement indicate that he is not a witness on whom reliance can be placed. The reason given for the korsha settlement seems to us far from satisfactory, and the whole story of an oral settlement appears most improbable.

As regards the structures in the Dhamsur property, the case for the appellant is that these were erected at her cost for about Rs. 4000. The source of the money is said to have been the sale of ornaments, receipt of various small sums from her mother and mother-in-law and "Asirbad" money given at the time of her marriage. According to the appellant, the main source was the "Asirbad" money amounting to Rs. 800. This, it is said, was kept with her uncle-in-law Rajendra Sarkar, who invested it on her behalf but the appellant could not say what amount was realised by this investment. Rajendra Sarkar makes no mention

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of the receipt or investment of this sum by him, and except for a vague statement of Rajendra Chakravarty who admits that he was not present when any money was given to Rajendra Sarkar, there is no corroboration of this part of the appellant's evidence, or of her claim to have received money from her mother or mother-in-law. Hriday Sarkar, P. W 8, alone corroborates the evidence of the appellant that she received Rs. 500 by the sale of her ornaments but even if that evidence be accepted, we think there is no adequate proof that she had sufficient means to construct the buildings on the Dhamsur property. It is admitted that the buildings on the Mallikbari property were dismantled and in the absence of any satisfactory evidence as to the disposal of the materials, we think it most probable that these were used for the construction of the new home at Dhamsur. Lalit Mohan Mustri, P. W. 5, admits that all the sheets used for the Dhamsur house were used materials, though he says of course that they were not brought from the Mallikbari house. However that may be, on consideration of the evidence as a whole we agree with the view of the learned Subordinate Judge that the story of the appellant's taking Korsha settlement and erection of the buildings on the Dhamsur property with her own money cannot be accepted. We think therefore that her claim to that property was rightly rejected.

With regard to Miscellaneous Appeal No. 5, Mr. Bakshi has contended that as the Hand-note was executed, the consideration paid, and the defendants are residents outside Calcutta, the High Court in the Original Side had no jurisdiction to try the suit in which the decree sought to be executed was passed. It is however not disputed that the assignment of the decree in Calcutta will constitute a part of the cause of action and it is conceded that there would be no want of jurisdiction if leave to sue in the Original Side was obtained. We must assume, *prima facie*, that the Court had jurisdiction unless absence of jurisdiction is apparent on the face of the record, and we agree with the learned Subordinate Judge in holding that no absence of jurisdiction is apparent. Moreover we find a clear admission in the written objection of the judgment-debtor that he was aware of the institution in the Original Side of this Court (a suit ?) for recovery of the amount claimed on the hand-note. The suit, it is said, was not contested because of an assurance given by the decree-holder's father that the decretal amount would be realised from other judgment-debtors. There is no reason to suppose that the necessary leave was not obtained in accordance with section 12 of the Letters Patent, and it is well settled that

where leave has been granted and where the propriety of the grant is challenged, the proper course is for the defendant to apply at the earliest opportunity for revocation of the grant. The decisions *Kalooram v. Jonishta* (1); *Daulatram v. Maharajlal* (2); *Harnathrai v. Sew Prosad* (3) and *Radhika Mohan v. Bhobani* (4) may be referred to in this connection. Although the defendant judgment-debtor was aware of the suit, he took no steps to revoke the lease or to set aside the decree and we agree that he cannot now be permitted in the course of execution proceedings to claim that the decree was without jurisdiction on this ground. We think this matter was decided correctly by the learned Subordinate Judge, and this appeal must therefore be dismissed.

In view of the conclusions reached above, we allow Miscellaneous Appeal No. 4 in so far as it relates to the appellant's claim to the Mallikabari property, and we direct that the execution case shall not proceed against that property, *i. e.* Lot Nos. 6 and 7 of the execution petition, and that such property shall be released from attachment forthwith. The appeal in regard to the Dhamsur property, Lot Nos. 4 and 8 of the execution petition is dismissed. We make no order as to the costs of these appeals.

Mukherjea, J. :—I agree.

M. A. K. ; A. T. M.

Appeal No. 4 allowed in part ;

Appeal No. 5 dismissed.

(1) (1935) 40 C. W. N. 161.

(2) (1935) 40 C. W. N. 164.

(3) (1935) 40 C. W. N. 165.

(4) (1936) 40 C. W. N. 717.

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Before Mr. Justice B. K. Mukherjee and Mr. Justice
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RAM BRICH SINGH

v.

THE PROVINCE OF BENGAL.*

Compensation—Validity of order made by arbitrator under Defence of India Act (Act XXXV of 1939)—Section 19 (1) (b), nature of reference under Arbitrator, if has jurisdiction to direct enquiry on a matter extraneous to the reference—Direction, if illegal and improper—Rules 5, 6 and 75A(1) of the Defence of India Rules.

In determining the validity or otherwise of an order made by an arbitrator under the Defence of India Act, the Court is to look primarily to the provisions of the Act itself and the Rules framed thereunder, and this can be supplemented by the provisions of general law with regard to matters on which the Act or the Rules are silent provided that they are not inconsistent with the latter.

If the person to be compensated prays for an arbitration on a specific ground, the Collector has not got to make a reference on that particular ground only. The entire question of compensation is referred to arbitration and the arbitrator is to hear the matter in accordance with the provisions of the Defence of India Act and follow, so far as practicable, the procedure laid down for suits of an original civil character in the Code of Civil Procedure. The jurisdiction of the arbitrator is not confined to a consideration of the only ground that has been taken by the claimant.

A reference to arbitration under section 19 of the Defence of India Act is not previously of the same character and has not the same legal implication as a reference to Court by the Collector under section 18 of the Land Acquisition Act.

It is open to the Central Government to raise an issue before the arbitrator relating to the measurement or area of the lands acquired even if the question was not raised at any earlier stage of the proceeding. The offer of Collector, which proceeded on the basis of certain measurement is not final on the law and it is open to the Central Government to ask the arbitrator to investigate the matter on other and further evidence.

There can be no question of sending the case back on remand by the arbitrator for further investigation by the Collector or for making a fresh offer to the claimant with the sanction of the Government. If a fresh offer is made

*Civil Revision Case No. 2114 of 1945) against the order of the Arbitrator, T. C. Banerjee, Esq., Additional District & Sessions Judge, Midnapore, dated 22nd September, 1945, passed in Arbitration Case No. 6 of 1944 (appointed under section 19 of the Defence of India Act).

which is not accepted by the claimant a fresh arbitration must necessarily followed and the basis of the present arbitration proceeding will disappear altogether.

The proper procedure for the arbitrator to follow will be to ask the parties to file their respective statements as contemplated in section 19 (1) (d) of the Defence of India Act.

Application for Revision by the Claimant for compensation.

Application for arbitration under section 19 (1) (b) of the Defence of India Act.

The material facts will appear from the judgment.

Dr. Narash Chandra Sen Gupta, Messrs. Jafindra Mohan Choudhury and Ranajit Acharyya Choudhury for the Petitioner.

Messrs. Apurba Charan Mukherjee and Nirmal Kumar Sen for the Opposite Party.

The following judgments were delivered :

Mukherjee, J. :—This Rule is directed against order of the Additional District Judge of Midnapore, dated the 12nd September, 1945, made as an arbitrator appointed under section 19 of the Defence of India Act.

The facts material for our present purposes may be shortly stated as follows. By an order, dated the 20th June, 1942, a large tract of land measuring about 1278'84' acres, situated in the District of Midnapore, and belonging to the petitioner and several other persons was requisitioned by the Central Government for the construction of an aerodrome, under Rule 75A(1) of the Defence of India Rules. There were different classes of lands comprised in the requisitioned area, and they consisted of *sal* jungles, *jhanti* jungles, paddy fields, waste lands and also lands on which *sabai* grass was grown. A map of the entire area was prepared some time in 1943 and the area of the land growing *sabai* grass was shown in the map to measure 437'38' acres. Sometime after this, the Central Government decided to acquire these lands permanently under Rule 75A(2) of the Defence of India Rules, and the notice of acquisition was served upon the petitioner on the 20th August, 1943.

On the 3rd September, 1943, the Collector assessed the amount of compensation payable to the petitioner in respect of the various classes of land, and 75 per cent. of the compensation money was paid to the petitioner on different dates,—the petitioner acquiescing in the valuation made by the Collector with regard to all classes of land except those on which *sabai* grass was grown.

The compensation allowed by the Collector in respect to the *sabai* grass lands was further reduced by the Central Government,

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and eventually, the rate fixed was Rs. 39-6 per acre on the basis of an out turn of 35 maunds per year.

The petitioner did not accept this valuation of the *saboi* grass land, and on the 31st October, 1944, the matter was referred, on his application, for arbitration to the then additional District Judge of Midnapore who was appointed an arbitrator under section 19 (1) (b) of the Defence of India Act.

In the letter of reference written by the District Magistrate, it was stated that 437.38 acres of land belonging to the petitioner were acquired under Rule 75A of the Defence of India Rules in connection with an airfield project at Salbani, and as the petitioner was not satisfied with the rates of compensation offered for these lands, this reference was made. The Government notification appointing Mr. T. C. Banerjee, the present Additional District Judge of Midnapore as arbitrator under section 19 of the Defence of India Act was made on the 19th May, 1945. This notification did not give the area of *saboi* grass lands acquired, but described them as arable lands growing *saboi* grass in seven *monzas* the names of which were mentioned in the schedule to the notification.

Both the parties appeared before the arbitrator in due course, and the case was fixed for hearing on the 15th September, 1945. On the 14th September, 1945, the Government pleader of Midnapore wrote a letter to the arbitrator stating that it appeared from the evidence subsequently received by the Collector that the figures regarding the area of the land in question under *saboi* grass cultivation, and the outturn thereof given in the map and the schedules were incorrect and were based on wrong data, and it was prayed that the case might be sent back for fresh enquiry and fresh offer with the sanction of the Government. The petitioner filed a written petition pointing out *inter alia* that the area of the *saboi* grass lands as shown in the map was never disputed and that the only controversy was about the annual outturn of these lands and the rates of compensation to be allowed for the same. The arbitrator, it was said, had no jurisdiction to direct a fresh enquiry regarding the area of the land, and it was entirely beyond the scope of reference. The arbitrator overruled this objection, and by an order, dated the 22nd September, 1945, directed that the case should be sent back for the purposes of a fresh enquiry and for a fresh offer by the Government. It is against this order that the present Rule has been granted.

The contentions raised on behalf of the petitioner are of a two-fold character. It is contended, in the first place, that the arbitrator

had no jurisdiction to direct enquiry on a matter which was wholly extraneous to the reference and in respect to which there was no dispute between the parties. It is argued in the second place that the order made by the arbitrator is illegal and improper and is not warranted by the Defence of India Act or the provisions of general law. We will take up these two points one after another.

Now, so far as the first ground is concerned, we are unable to accept the contention put forward by Dr. Sen Gupta that a reference to arbitration under section 19 of the Defence of India Act is precisely of the same character and has the same legal implication as a reference to Court by the Collector under section 18 of the Land Acquisition Act. Under section 11 of the Land Acquisition Act, the Collector has to make an award determining the true area of the land and the compensation which, in his opinion, should be allowed for it and subject to the provisions for reference contained in the Act, such award is final and conclusive as between the Collector on the one hand and the persons interested on the other as regards the true area and value of the land. Under section 18 of the Land Acquisition Act, any person who has not accepted the award may by written application to the Collector require that the matter may be referred by the Collector for determination by the Court and the section specifies four different grounds of objection namely, (1) to the measurement of the land; (2) to the amount of compensation; (3) to the persons by whom it is payable; and (4) to the apportionment. By section 20 of the Land Acquisition Act, the function of the Court on a reference being made is to determine the objection, and only persons interested in the objection are to be summoned before it, and by section 21, the scope of the enquiry is to be restricted to a consideration of the interest of the persons affected by the objection. As was pointed out by their Lordships of the Judicial Committee in *Pramatha Nath Mullick v. Secretary of State for India in Council* (1), the jurisdiction of the Court under the Land Acquisition Act is strictly limited by the terms of these sections. It only arises when a specific objection has been taken to the Collector's award, and it is confined to consideration of that objection only.

It is quite true that in assessing compensation for lands acquired under the Defence of India Rules, the Central Government adopts as its guide the main procedure laid down in the Land Acquisition Act, but the provisions of the Land Acquisition Act except in so far as they are expressly incorporated in the Defence of India Act or

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the Rules framed thereunder, do not in terms apply to any acquisition under the latter. In determining the validity or otherwise of an order made by an arbitrator under the Defence of India Act, we have got to look primarily to the provisions of the Act itself and the Rules framed thereunder, and this can be supplemented by the provisions of general law with regard to matters on which the Act or the Rules are silent provided that they are not inconsistent with the latter.

Section 19 of the Defence of India Act lays down that in a case of compulsory acquisition of immovable properties, compensation shall be paid, the amount of which will be determined in accordance with the principles set out in the section itself. The first provision is that when the amount of compensation can be fixed by agreement, it shall be paid in accordance with such agreement, where no such agreement can be reached, the Central Government is to appoint an arbitrator. Section 19 (1) (d) further provides that at the commencement of the proceeding before the arbitrator, the Central Government and the person to be compensated shall state what, in their respective opinions is a fair amount of compensation. Clause (e) provides that the arbitrator in making his award shall have regard to the provisions of sub-section (1) of section 23 of the Land Acquisition Act, 1894 so far as the same can be made applicable. Lastly, clause (g) lays down that save as provided in this section and in any rules made thereunder, nothing in any law for the time being in force shall apply to arbitrations under this section. Sub-sections (2) and (3) empower the Central Government to make rules for the purpose of carrying into effect the provisions of this section.

Rule 5, thus framed, indicates the manner in which a person to be compensated and who does not accept the offer has got to apply for arbitration. He has to make an application to the Collector for referring the case to arbitration with necessary written statement of his case. Upon the application being made, the Collector shall refer the case with all relevant papers to the arbitrator and give notice of the reference to the person or persons to be compensated.

Rule 6 contains a very important provision, and lays down that the arbitrator shall have like powers and shall follow the like procedure as the Court has and follows in the exercise of its ordinary original civil jurisdiction under the Code of Civil Procedure, 1908.

From the provisions set out above, it is quite clear to our minds that if the person to be compensated prays for an arbitration on a specific ground, the Collector has not got to make a reference on

that particular ground only. The entire question of compensation is referred to arbitration, and the arbitrator is to hear the matter in accordance with the provisions of the Defence of India Act, and follow, so far as practicable, the procedure laid down for suits of an original civil character in the Code of Civil Procedure.

The offer of compensation made by the Government under the Defence of India Act is not an award within the meaning of section 11 of the Land Acquisition Act. It is not conclusive evidence of the area or value of the land as between the Collector and the person to be compensated as is the case under the Land Acquisition Act. A reference to arbitration made under section 19 of the Defence of India Act is different in material particulars from a reference to Court under section 18 of the Land Acquisition Act; and the functions to be discharged by the arbitrator are not precisely the same that are exercisable by the Court under the provisions of the Land Acquisition Act.

The Collector, as said above, in referring the matter to arbitration has not got to specify any particular ground of objection; nor is the jurisdiction of the arbitrator confined to a consideration of the ground that has been taken by the claimant. The entire matter relating to the compensation of the land is referred to the arbitrator, and at the commencement of the proceedings, each party has to state what, in his opinion, is a fair compensation for the land acquired. These statements take up the position of pleadings before the arbitration Court and upon these pleadings, the arbitrator has got to determine the questions in issue following in substance the procedure laid down in the Code of Civil Procedure. We hold, therefore, that it is open to the Central Government to raise an issue before the arbitrator relating to the measurement or area of the lands acquired as such matters are quite relevant for the purpose of determining the amount of compensation money to be paid for the land. The offer of the Collector which proceeded on the basis of certain measurements is not final on the point, and it is open to the Central Government to ask the arbitrator to investigate the matter on other and further evidence. The first point, therefore, raised by Dr. Sen Gupta fails.

We think that the second ground put forward in support of the petition is more substantial. It is quite open to the arbitrator, as has been said already, to enter into the question of measurement or the area of the lands acquired even if the question was not raised at any earlier stage of the proceeding. But we do not and cannot approve of the procedure that has been followed or the order that

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has been made in this case. There can be no question of sending the case back on remand for further investigation by the Collector or for making a fresh offer to the claimant with the sanction of the Government. If a fresh offer is made which is not accepted by the claimant a fresh arbitration must necessarily follow, and the basis of the present arbitration proceeding will disappear altogether.

The proper procedure for the arbitrator to follow, in our opinion, will be to ask the parties to file their respective statements as contemplated by section 19 (1) (d) of the Defence of India Act. It will be open to the Central Government, if it so likes, to aver in its statement that the area of the *saboi* grass land is much less than what it was originally thought to be, and consequently the amount of compensation would be much less. The question of area will then be a material issue in the case, and it will be open to the arbitrator to decide this question either by taking evidence himself or by directing a local investigation by a competent Commissioner according to the provisions of the Code of Civil Procedure.

We may observe here that as the provisions of the Code of Civil Procedure are to be followed, the petitioner will be entitled to inspect all the documents which the Central Government may file in support of its written statement.

This Rule, therefore, succeeds in part. The order made by the arbitrator is set aside and the case is sent back to be proceeded with in accordance with the directions given above.

We make no order as to costs in this Court.

Let the records be sent down as early as possible.

Blank, J.:—I agree.

M. A. K.; A. T. M.

Rule made absolute in part;

Case sent back.

APPELLATE CIVIL.

Before Mr. Justice P. Chakravarti.

BAIDYA NATH CHAKRAVARTTI AND OTHERS

v.

KRISHNA BHUSAN DAN AND OTHERS *

CIVIL.

1946.

June, 3.

Lease—Construction of—Demising tank for rearing fish and the bank to plant and cut down trees—One instrument containing two leases—Lease of land with trees standing thereon—Lessee's enjoyment—Maintaining garden and trees standing thereon—Development of land as garden.

Where lands on the banks of a tank are demised, as such, for the purposes of cultivation and the demise of the tank is attached thereto generally in aid of the cultivation of the banks, whether expressly or by implication, the lease is for agricultural purposes but where the lease of the tank is for rearing fish therein with a right to cut-down trees from and plant trees on the bank, it cannot be a lease for agricultural purposes.

Where two distinct properties are demised by the same instrument and indeed by the same sentence in the same instrument, it is hardly likely that the parties would be contemplating a tenancy for one purpose in respect of one of the properties and a tenancy for quite a different purpose in respect of the other property.

If a piece of land with trees standing thereon is let for enjoyment by the lessee merely by cutting down the trees which may be standing on the land or by planting new trees, whether such trees be fruit trees or merely trees yielding timber, there would be no lease for agricultural or horticultural purposes.

Raj Kumar Nali v. Mohesh Chandra Guha (1) followed.

Srs. Rakhyani Mani Debi v. Paramesh Chakravarti (2) doubted.

Where the lease is generally for maintaining the garden and trees therein as it was with the right of planting new trees if the lessee so chose, but the purpose was not that the land would be developed as a garden, it is not for agricultural or horticultural purpose.

Appeal by the Defendants.

Suit for declaration.

The material facts appear from the judgment.

*Appeal from Appellate Decree No. 1688 of 1942, against the decree of G. M. Chatterjee, Esq., Subordinate Judge at Asansol of Zillah Burdwan, dated the 6th of July, 1942, reversing the decree of Mouvlal A. Quasom, Munsiff, 2nd Court, Asansol, dated the 11th of March, 1941.

(1) (1917) 42 I. C. 580.

(2) (1925) 96 I. C. 89.

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Baldya Nath
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v.

Krishna Bhushan
Dan.

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Messrs. Eapkim Chandra Mukherjee and Sailendra Nath Banerjee for the Appellants.

Mr. Apurbadhan Mukherjee for the Respondents.

The following judgment was delivered :

Chakravartti, J. :—This appeal is on behalf of the defendants who on the 29th of July, 1895, obtained a lease of a certain tank with its banks and also a certain area of Bagan land situated in another Mouza from one Bishnupriya who had a Hindu Widow's interest. The Plaintiffs had brought the suit out of which this appeal arises as reversioners to Ram Bishnu, the husband of Bishnupriya. Two questions were agitated in the courts below, first, whether the lease was warranted by legal necessity and secondly, assuming it was not, whether the defendants had acquired a right of occupancy by their possession as raiyats under the limited owner so long as she was alive. It may be pointed out that the defendants are otherwise settled raiyats of the village.

The trial Court held in favour of the defendants on both the grounds. It held that legal necessity had been proved and also that the defendants must, in any event, be held to have acquired an occupancy right. On appeal the Lower Appellate Court reversed the trial Court's judgment on both the points.

So far as the first ground is concerned, it is quite clear it is a finding of fact, but Mr. Mukherjee, appearing on behalf of the appellants, complained that it was not a proper finding of reversal. The Lower Appellate Court, on an extensive review of the circumstances, held that it had not been proved that this particular transaction of a lease had been caused by any necessity felt by Bishnupriya with regard to her maintainance or with regard to finding money for her litigation with her mother-in-law. The Court of appeal below has observed that there was no evidence of either necessity. Mr. Mukherjee pointed out one sentence in the evidence of the first defendant who said in a broad manner that the settlement with the defendants had been for maintainance and legal necessity. Founding on this statement Mr. Mukherjee contended that the conclusion of the learned Judge could not be sustained inasmuch as he had omitted to consider this evidence.

It does not appear to me that the evidence referred to is evidence of any fact at all. It was merely a statement of a general character that the lease had been granted for the purpose of lessor's maintenance. That meaning of the statement becomes

clear when one notices the other statement by which it was followed, namely, that a lease was for legal necessity. It seems to me that by the statement upon which Mr. Mukherjee relies the witness was not stating any fact at all but only repeating a legal formula. I am not prepared to hold that the finding of the learned Judge can be assailed on this ground which Mr. Mukherjee put forward.

The decision of the second question depends upon the true construction of the lease. The Court of appeal below has held that there could be no question of the defendants' acquiring an occupancy right in the lands demised, since the lease was not for either agricultural or horticultural purposes. This construction of the lease was assailed by Mr. Mukherjee who contended that the purpose of the lease was agricultural as the term had been understood by the Courts.

On reference to the lease, it appears, that by it two distinct properties are demised. One is a tank together with its banks another is an area of what is described as Bagan land. With regard to the first property it is stated that the lessee would enjoy the tank by rearing fish in the water and by cutting down or planting trees on the banks and also by removing the silt from the bottom of the tank. With regard to the second property which is dealt with by the same sentence, it is stated that the lessee would enjoy it "by cutting down the trees of the said garden or planting trees therein". A reference to the schedule to the lease shows that the first property was demised primarily as a tank with the banks as appertinances. The second property was of course demised as a garden.

So far as the first property is concerned, it is to my mind reasonably clear that agriculture was not in the contemplation of the parties at all. As I have pointed out the lease is primarily of the tank and the reference to the bank, it appears to me, is only incidental. This is not a case where lands on the banks of a tank are demised, as such, for the purposes of cultivation and the demise of the tank is attached thereto generally in aid of the cultivation of the banks, whether expressly or by implication. A lease of a tank for rearing fish therein with a right to cut down trees from and plant trees on the bank cannot be, in my view, a lease for agricultural purposes.

By what I have said, I have gone far towards construing the other demise as well. For both are effected by the same instrument and indeed by the same sentence in the same instru-

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ment. In these circumstances it is hardly likely that the parties would be contemplating a tenancy for one purpose in respect of one of the properties and a tenancy for quite a different purpose in respect of the other property, although both were conveyed by the same language. But apart from that, taking the lease by the garden land by itself, it is a lease of land which has trees standing thereupon and in respect of which the lessee is given the right to cut down trees and to plant new trees. Such a lease fell to be construed in the case of *Raj Kumar Nali v. Mohesh Chandra Guha* (1) where it was held by Fletcher and Newbould, J.J., that a piece of land containing fruit trees, if let out on such terms that the lessee would enjoy the fruits of the trees and would be also entitled to plant new trees, would not be let for agricultural or horticultural purposes. That is a decision which goes as near the present case as any reported case does and by that decision I am bound. Mr. Mukherjee, however, wanted to distinguish that case by pointing out what he thought was a distinguishing feature. He referred to the statement contained in the judgment that there was nothing relating to a garden on that piece of land at all. That however did not mean that the land was not a garden land in the Indian sense but meant, what the learned Judges themselves went on to say in the next sentence, that what existed on the land was an orchard as the term was understood in the English language. The principle of that decision seems to me to be that if a piece of land with trees standing thereon is let for enjoyment by the lessee merely by cutting down the trees which may be standing on the land or by planting new trees, whether such trees be fruit trees or merely trees yielding timber, there would be no lease for agricultural or horticultural purposes. There is a decision of Mr. Justice Cuming, sitting singly, in the case of *Sm. Rakhya Mani Debi v. Paramesh Chakravarti* (2) which might at first sight appear to take a different view. But that decision is easily distinguishable, for there the lessee expressly undertook to grow up a garden by planting new trees. In any event I am bound by the decision of the Division Bench.

I realise that to decide a question of a construction of a document by referring to precedents is not very satisfactory. But I have considered the terms of this lease on my own account and I cannot persuade myself that the purpose of the tenancy

(1) (1917) 42 L. C. 580.

(2) (1925) 96 I. C. 89.

was anything like agricultural or horticultural. It seems to me to have been a lease for generally maintaining the garden and trees therein as it was with the right of planting new trees if the lessee so chose, but the purpose was not that the land would be developed as a garden.

On the construction of the lease which the Court below adopted and which I consider to be the right construction, there could not be any question of any occupancy right. The second ground urged by Mr. Mukherjee must also fail.

In the result the appeal is dismissed with costs.

S. C.

Appeal dismissed.

*Before Mr. Justice B. K. Mukherjee and Mr. Justice
Sharp.*

MANMATHA PAL CHOUDHURY
AND ON HIS DEATH HIS SOLE HEIR
AND LEGAL REPRESENTATIVE
AMIYA PAL CHOUDHURY

v.

KARTICK CHANDRA BASER.*

Incumbrance—Niskar tenancy created by tenure-holder under the settlement-holder—Bengal Tenancy Act (VIII of 1885), section 161—Annulment—Creation of Niskar tenancy, effect of.

In order that a tenancy may be an incumbrance in accordance with law, it must be an interest which the tenant is capable of creating. The interest of Niskar-tenant which the tenure-holder under the settlement-holder of a temporarily settled estate in the Sundarban area created was not altogether void.

A Niskar tenancy is a tenancy and a sub-tenancy comes within the definition of an incumbrance as given in section 161 of the Bengal Tenancy Act. The purchaser in execution of rent-decree against the tenure-holder must therefore annul the incumbrance before he can claim possession.

*Appeal from the Appellate Decree No. 1290 of 1941, against the decree of J. Younis, Esq., Additional District Judge, 3rd Court of Zillah 24-Parganas, dated the 28th of April, 1941, affirming the decree of Jitendra Nath Maitra, Esq., Munsiff of 3rd Court, Basirhat, dated 30th of November, 1940.

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If the tenure-holder's interest has come to an end by efflux of time or otherwise, it would be open to the settlement-holder to have appropriate remedy allowed to him by law.

Appeal by the Plaintiff.

Suit for assessment of fair and equitable rent and for damages for use and occupation for a period prior to the institution of suit.

The material facts will appear from the judgments.

Messrs. Amarendra Nath Bose, Hemanta Kumar Bose and Satyabrata Dutta for the Appellant.

Messrs. Biswanath Naskar, Abinash Chandra Bhattacharji and Amiya Kumar Mukherjee for the Respondent.

The following judgments were delivered :

March, 29.

Mukherjee, J. :—This appeal is on behalf of the plaintiff and it arises out of a suit commenced by him for assessment of fair and equitable rent of the lands in suit with a further claim for damages for use and occupation for a period of two years prior to the institution of this suit.

The subject-matter of dispute is a plot of land measuring 6 bighas and odd cottas recorded in Khatian No. 115 of Mouza Manmathanagar which appertains to a temporarily settled estate in the Sunderban area of which the plaintiff is admittedly the settlement holder. Under the plaintiff the Basers had a tenure recorded in Khatian No. 57 of the said *mouza*. The tenure of the Basers was sold in execution of a rent decree obtained by the plaintiff, and it was purchased by the plaintiff on the 13th December, 1937. The plaintiff, when he went to take possession of the lands, found the defendant in occupation of the disputed plot and he purported to hold the same as a *shobait* of certain deities known as Banbibbi and Bastu Debi. In the revised settlement records, the land was recorded as *niskar* belonging to the deities mentioned aforesaid of which defendant Kartick Chandra Baser was the *shobait*. The plaintiff's case is that the alleged *niskar* which was created by the Basers was not binding on him as a rent sale purchaser, and he brought the suit for assessment of fair and equitable rent in respect of the land in suit.

The defendant denied the plaintiff's purchase of the Basers' tenure in execution of the rent decree, and his further case was that the land was rent free and was not liable to be assessed with rent. Both the Courts below had dismissed the plaintiff's suit and the plaintiff has now come up on second appeal to this Court.

The Court of appeal below has taken the view that the *niskar* sub-tenancy created by the Basers was an incumbrance within the

meaning of section 161 of the Bengal Tenancy Act. The plaintiff, as the purchaser of the tenure in execution of a rent decree was perfectly entitled to annul the incumbrance by serving a notice on the *niskar* holder under section 167 of the Bengal Tenancy Act. This he did not do. The incumbrance, therefore, subsists, and the plaintiff is bound by it in the same way as the old tenant was. It is not open to him to claim rent in respect of the land with regard to which there was a rent free grant created by the old tenure-holder.

Mr. Bose appearing on behalf of the plaintiff appellant has contended before us that the interest which was alleged to be created by the Basers in the favour of the two deities could not be said to be an incumbrance within the meaning of section 161 of the Bengal Tenancy Act, and consequently it was not necessary for his client to annul it and it was quite within his rights to demand rent from the defendant who was holding the land within the ambit of his *mekhal* without paying any rent for the same.

The ground put forward by Mr. Bose in support of his contention that the *niskar* interest was not an incumbrance is that it was beyond the competence of the Basers who were the tenure-holders under the plaintiff to create an interest of this kind. Undoubtedly, in order that it may be an incumbrance in accordance with law, it must be an interest which the tenant is capable of creating; but we cannot hold that the interest of *niskar* tenant which the Basers attempted to create was altogether void. A *niskar* tenancy is also a tenancy, and a subtenancy comes within the definition of an incumbrance as given in section 161 of the Bengal Tenancy Act.

The only thing that is alleged by Mr. Bose is that the Basers themselves being tenure-holders for a limited period, were not competent to make a grant which was to exist in perpetuity. We do not know what the period of the Basers' tenancy was and when and how it did come to an end. As the encumbrance was not annulled by the rent sale purchaser, it did subsist and was binding upon the latter in the same way or, it would have been binding upon the tenure-holder who created it, but if the tenure-holders' interest itself has come to an end by efflux of time or otherwise, it would be open to the plaintiff to have appropriate remedy allowed to him by law. We need not express any opinion on this point.

This appeal is dismissed. We make no order as to costs in this Court.

Sharpe, J. :—I agree.

M. A. K. ; A. T. M.

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Mukherjee, J.

Appeal dismissed.

*Before Sir Rupendra Coomar Mitter, Acting Chief Justice and
Mr. Justice N. L. Hindley.*

CIVIL.

1946.

JUNE, 6, 10, 11.

DHARANIDHAR GHOSE

v.

PHANI BHUSAN MUKHERJEE AND OTHERS.*

Appeal, if lies—Order for payment to Commissioner for partition—Code of Civil Procedure (Act V of 1908), section 56, Order XXI, section 47—Application for execution of such order, dismissed.

The proceedings for execution of an order in favour of Commissioner of partition in a partition suit to realise his dues do not come under section 47 of the Code of Civil Procedure as a question relating to execution, discharge or satisfaction of a decree does not arise in this case nor is it a question between the parties to the suit.

Chandra Kumar De v. Kusum Kumari Roy (1) not followed.

Appeal by Commissioner of partition.

Application for execution of order in favour of Commissioner to realise his dues.

The material facts appear from the judgment.

Messrs. H. C. Dhar and Satya Charan Pain for the Appellant.

Mr. Nagesh Kumar Dutt for the Respondents.

The following judgment was delivered :

This appeal arises out of an application for execution of an order of the Subordinate Judge, 1st Court, Hooghly, dated the 15th of August, 1943. This order was made in favour of the Commissioner of partition in a suit for partition. This order is in these terms: "The plaintiff and defendants were repeatedly asked to pay but did not pay to the Commissioner. The Commissioner may execute the Court's order against the plaintiff and defendants to realise his dues".

The learned Subordinate Judge has dismissed the Commissioner's application for execution. Under section 36 of the Code of Civil Procedure, the provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders. The matters of procedure laid

* Appeal from Original Order No. 227 of 1943 with Civil Rule No. 626(M) of 1946, against the order of Naresh Chandra Roy Esq., Subordinate Judge, 1st Court, Zilla Hooghly, dated the 19th of August, 1943.

(1) (1924) J. L. R. 52 Calc. 269; 40 C. L. J. 180.

JUNE, 11.

down in order 21 of the Code of Civil Procedure for execution of decrees, will, so far as applicable, apply to execution of orders, which are not decrees. The Commissioner has appealed to this Court against the order rejecting his application for execution.

A preliminary objection was taken by the learned advocate on behalf of the respondents as to the maintainability of the appeal. The preliminary objection must prevail. The proceedings for execution of the order in question do not come under section 47 of the Code of Civil Procedure, as a question relating to execution, discharge, or satisfaction of a decree does not arise in this case. Further this question does not arise between the parties to the suit. The learned advocate for the appellant relied upon a decision of this Court in the case of *Chandra Kumar De v. Kusum Kumar Ray* (1). In that case, however, the Court did not consider the question whether the order related to a question between the parties to the suit. On the other hand a decision of the Allahabad High Court rather goes to indicate that an appeal against an order refusing to execute an order passed in favour of the Commissioner is not appealable. We are, therefore, of opinion that the present appeal is incompetent.

The learned advocate for the appellant thereafter applied before us for treating the memorandum of appeal as a petition for revision in this case. There is no ground for revision under section 115 of the Code of Civil Procedure. The result is that this appeal is dismissed, but there will be no order as to costs in this appeal.

No order is necessary on the connected Rules.

S. C.

(1) (1924) I. L. R. 52 Calc. 269; 40 C. L. J. 180.

CIVIL.

1945.

Dharanidhar Ghose

v.
Phani Bhushan
Mukherjee.

Before Mr. Justice A. G. R. Henderson.

APTAR ALI TALUKDAR AND OTHERS

v.

AHAMMAD ALI MOLLA AND OTHERS.*

CIVIL,

1946,

January, 31,
February, 4.

Ultra vires—Bengal Tenancy Act (VIII of 1885), section 26G(5)—Bengal Agricultural Debtors Act (VII B. C. of 1936), section 36, if inconsistent with former.

Section 36 of the Bengal Agricultural Debtors Act has repealed section 26G of the Bengal Tenancy Act so far as the mortgage is concerned.

An occupancy riyat who had obtained a settlement of mortgage debt under section 18(2) which was embodied into an award under section 19 from the Debt Settlement Board on his petition under section 26G(5) of the Bengal Tenancy Act, can apply for and obtain a better remedy under Act VI of 1938.

Appeal by Applicants, the Assignees of the mortgagor.

Application under section 36 of the Bengal Agricultural Debtors Act.

The material facts appear from the judgment.

Mr. Prafulla Kumar Roy (for Mr. Jitendra Nath Guha) for the Appellants.

Messrs. Tafazzal Ali and Surajit Chandra Lahiri for the Respondents.

The following judgment was delivered :

Henderson, J. :—This appeal is by the assignees of the mortgagor and arises in connection with an application filed by them under section 26G(5) of the Bengal Tenancy Act. There were two mortgages, one for Rs. 475 and the other for Rs. 300.

The mortgagor's heirs applied for settlement of the debt to a Debt Settlement Board. The debt was determined under section 18(2) of the Act at Rs. 450. A settlement was then made under section 19 by which the respondents were to remain in possession of most of the land for fifteen years, at the end of which period the debt would be taken to be extinguished. This agreement was embodied in the award on the 18th October, 1939 ; Act VI of 1938 came into force on the 18th August, 1938. As it gives the

*Appeal from Appellate Order No. 204 of 1943, against the order of G. K. Nag, Esq., Additional District Judge, and Court, District Beckerganj, dated the 29th March, 1943, reversing the order of P. K. Sarkar, Esq., Munsiff, 4th Court, Patuakhali, dated the 3rd October, 1942.

February, 4.

appellants a better remedy, they filed the present application. The question for determination is whether they are entitled to do so. The Courts below have differed on the point.

It is not very easy to follow the judgment of the learned Additional District Judge. Mr. Roy thought that he held that, inasmuch as the mortgage was extinguished by the award, there was nothing left upon which the present application could proceed. He certainly referred to that in the opening part of his judgment as an agreement. But he nowhere makes it a ground of his decision, and in view of the provisions of section 27, it would be impossible to support such a view. In my opinion the learned Judge intended to hold that the present application is incompetent in view of the provisions of the Bengal Agricultural Debtors Act, although he has not given any reason for that opinion.

The learned Munsiff relied upon the words "notwithstanding anything contained in any other law" in section 26G(5). To this Mr. Ali relied with the similar words in section 36 of the Bengal Agricultural Debtors Act. The question, therefore, arises which, in a case of a conflict will prevail.

Mr. Lahiri contended that the Bengal Agricultural Debtors Act confers a special jurisdiction on a special tribunal and it is not open to the Courts to give any relief. I should certainly not be prepared to go as far as that. On the other hand, Mr. Roy argued that the Bengal Tenancy Act and Bengal Agricultural Debtors Act are both special Acts dealing with absolutely distinct matters—the former with the relationship of landlord and tenant and the latter with the relationship of creditor and debtor. Broadly speaking this may be perfectly true; but section 26G of the Bengal Tenancy Act is really part of the law of creditor and debtor suggested into an Act, dealing with different subject matters.

The Bengal Agricultural Debtors Act deals with agricultural debtors in general while section 26G of the Bengal Tenancy Act deals with particular class of them. It is, therefore, quite meaningless to suggest that the former is a special Act and the latter a general Act. There is nothing unreasonable in a provision by which an agricultural who took advantage of a less adequate remedy should be allowed to take advantage of a later and better one. This provision in section 26G of the Bengal Tenancy Act is quite inconsistent with that in section 36 of the Bengal Agricultural Act. The proper inference, therefore, is that by implication it repeals the section so far as these particular mortgages are concerned.

On the other hand, there is nothing really inconsistent in the

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1946.

Aptar Ali Talukdar
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Aftar Ali Talukdar
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Ahmed Ali Molla.

Henderson, J.

two Acts. The only provision in the Bengal Agricultural Debtors Act, which would interfere with the jurisdiction of the Munsiff to give relief, is that in section 18(4) which prohibits the Court from calling in question the amount of the debts determined by the Board under sub-section (2). Here, there is no attempt to question the figure of Rs. 450 as settled by the Board. The new section merely provides that by a legal fiction that debt, whatever may be its amount, has been paid off.

The appeal is accordingly allowed, the order of the lower Appellate Court is set aside and that of the Munsiff restored.

I make no order as to costs.

S. C.

Appeal allowed.

CIVIL REVISION.

Before Mr. Justice A. G. R. Henderson.

CIVIL.

1946.

January, 23.

ABDUL GAFUR

v.

GURA MIA AND OTHERS.*

Bengal Tenancy Act (VIII of 1885), section 103 (3) clause (c)—Concise statement—Order for issue made—No return from Post Office—Presumption that ordinary course of business was followed and that the document was lost in Court office, if can be made—Failure to issue, if a material irregularity—Application under section 174 (3) of the Act—Whether on such failure the sale is liable to be set aside.

Held: That when an order was recorded directing the concise statement to issue, no presumption can be drawn that the ordinary course of business was followed, if it remained untraced.

That failure to issue this statement is a material irregularity causing injury to the petitioner and the sale is liable to be set aside.

*Civil Revision Case No. 1030 of 1945, against the decision of G. B. Syngé Esq., District Judge of Chittagong, dated the 19th February, 1945, reversing the decision of B. Ahmed Esq., Munsiff, North Raxman, dated the 4th December, 1944.

Application for Revision by one of the Judgment-debtors.

Application under section 174(3) of the Bengal Tenancy Act.

The material facts will appear from the judgment.

Mr. Imam Hossain Choudhury for the Petitioner.

Mr. Rohini Binode Rakshit for the Opposite party.

The following judgment was delivered :—

Henderson, J. :—This Rule has been obtained by one of the judgment-debtors who filed an application under section 174(3) of the Bengal Tenancy Act. He filed it within time and no question of limitation arises.

Apart from the usual allegation that the sale proclamation was suppressed, the petitioner made a case that no concise statement was issued on him or any of the judgment-debtors. The learned Munsiff found that this was established and set aside the sale. That decision has been reversed by the learned Judge.

There is no evidence whatever to prove the issue of the concise statement. On the 10th of July, 1941, an order was recorded directing it to issue. No presumption can be drawn that the ordinary course of business was followed, because in this particular case it has not been followed. The learned Judge said that there was a similar mistake in connection with the sale proclamation. But the return of the sale proclamation shows that it was issued. In the case of the concise statement, there is no return from the post office. The learned Judge cannot possibly argue from that that, because some other documents were returned, this document was also returned. Mr. Rakshit suggested that this return was lost in the office. All I can say about that is that there is no presumption that the documents were lost in the office. The plain fact of the matter is that there is no evidence to prove the issue of the concise statement and there are no materials upon which the finding of the learned Munsiff on this point could be reversed.

It is not very clear whether the learned Judge thought that the failure to issue this statement was a material irregularity or not. Mr. Rakshit is willing to interpret the judgment to mean that he did think so. He then said that in any event the irregularity had not caused any injury to the petitioner.

The way the learned Judge dealt with this part of the case was to say that it was all the fault of the petitioner. He ought

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CIVIL.

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Henderson J.

to have paid the rent. He therefore must have expected that a decree would be passed and he must have also expected that the decree would be executed etc. His case is that he himself was in Rangoon while all this was going on. Be that as it may, a consideration of this kind is entirely beside the point. The result of the irregularity was that the petitioner was prevented from paying the amount into court in order to avert the sale, just as he has done immediately afterwards as soon as he came to know of it. This irregularity is the direct cause of his property being sold for an inadequate sum.

The Rule is accordingly made absolute, the order of the lower Appellate Court is set aside and that of the Munsiff restored.

As the decree-holders have got their money, they are not opposing the Rule and I make no order for costs.

S. K. B ; S. C.

Rule made absolute.

APPELLATE CIVIL.

Before Mr. Justice W. Mac C. Sharpe.

MAHARAJ BAHADUR SING

v.

CIVIL.

1946.

January, 25, 30.

BARKATULLA GACHUA AND OTHERS.*

Bengal Tenancy Act (Act VIII of 1885), Section 103B—Presumption of correctness of the Record of Rights—Issue framed about correctness of the Record of Rights—No specific mention of rebuttal of presumption in the judgment of Courts below—Question of correctness or otherwise of the Record of Rights, whether can be raised in second appeal—Recitals in tenant's Kobala covering the land in suit, if binding on landlord—Kobala, if admissible in evidence—Indian Evidence Act (I of 1872) section 13.

Held: That where the entries in the settlement record formed the cause of action of the action in suit and the courts below did not note specifically that the presumption of correctness of the Record of Rights had been

*Appeal from Appellate Decree No. 12 of 1943, against the decree of S. K. Roy Esq., Additional District Judge of Zillah Dinajpur, dated the 27th May, 1942, affirming the decree of S. B. Mondal Esq., Munsiff, 1st Court, Dinajpur, dated the 25th April, 1941.

rebutted but where there was a specific issue on the question of the correctness and it was definitely found on examination of the evidence of both parties that the entries were not correct, this necessarily implies a finding that the presumption of correctness is rebutted.

Aspin Bahari Dandapat and others v. Trailakya Nath Dandapat and others (1) and *Shanharree Dagadujirao Jahagirdar v. Sambhu Walled Nathu Patil* (2) distinguished.

Though the recitals in the tenant's Kobala are not binding on the landlord yet the Kobala is admissible in evidence under section 13 of the Evidence Act especially when it covers the land in suit.

Appeal by the Defendant.

Suit for declaration of title and confirmation of possession.

The material facts will appear from the judgment.

Mr. Urukramdas Chakravarti for the Appellant.

Mr. Sushil Kumar Banerjee for the Respondents.

Mr. S. C. Lahiri for the Deputy Registrar.

C. A. V.

The following judgment was delivered :—

Sharpe, J. :—This appeal arises out of a suit by the plaintiffs for a declaration of their title to and for confirmation of their possession of the suit land, which is C. S. Plot 4450 and which, according to the plaintiffs has been wrongly recorded in the khas khatian of their landlord, defendant No. 1, and in the plaintiff's forceful possession. According to them, it should have been recorded in their possession in khatian No. 76 pertaining to their Jama of Rs 7-9-0, and they prayed therefore for correction of the settlement records. The suit was contested by defendant No. 1 who claimed that the land was his khas land and appertained to a Jama of Rs. 18-14-0 which had been held by the plaintiffs, but which had been sold in execution of a rent decree, and thereafter settled by him with defendant No. 2, who was in possession.

Plaintiffs based their title on a kobala Ex. 2 by which the suit land and other plots were purchased by their father and uncle from one Fazarulla, who had purchased from Kasimulla in whose name the Jama stood originally. Defendant No. 1 on the other hand produced a certificate of sale, Ex. A, and claimed that plot No. 12 of that certificate was the plot in dispute. The

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(1) (1926) 31 C. W. N. 448.

(2) (1940) 45 C. W. N. 57.

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learned Munsiff who tried the suit held that plaintiffs' document clearly covered the suit land, that the defendant's document did not, and that the plaintiffs had proved their title. He found also that the suit land had all along been in possession of the plaintiffs and that the C. S. Khatian was therefore liable to be corrected. He decreed the plaintiffs' suit accordingly, declaring their title, confirming their possession and directing correction of the khatians.

An appeal against this decision was dismissed. The learned Additional District Judge who heard the appeal held on a careful and detailed discussion of the documents of title that the plot in dispute appertained to the Jama of Rs. 790 and that the plaintiffs had title to the same. He held further on consideration of the evidence that the plaintiffs had been all along in possession of the disputed plot and that defendant No. 1 had never been in khas possession of it, and consequently that the entries in the record of rights were incorrect.

Two points have been urged on behalf of the appellant. The first is that the decision of the Courts below is bad because they did not take into consideration the presumption of correctness of the record of rights; the second is that the entries in the plaintiffs' kobala on which his title was based were neither admissible against nor binding on the landlord and should not have been relied on for establishing their title.

In support of the first contention, reliance has been placed on *Bepin Behari Dandapat & others v. Trailakya Nath Dandapat & others* (1) and *Shankarrao Dagadujirao Jahagirdar v. Sambhu Wallad Nath Patil* (2). It seems to me, however, that the facts of the present case are very different from the facts then under consideration. In the earlier case, the plaintiffs sued for declaration of their title and confirmation of possession of land of which they had been in possession continuously since their purchase in 1894 B. S. first through tenants and thereafter in khas from 1910 and obtained a decree. In the record of rights prepared in 1916, the suit land was recorded in the possession of the defendants, and since it did not appear that the District Judge, who affirmed the decision of the trial Court decreeing the plaintiffs' suit, had allowed the defendant the benefit of the presumption arising from

(1) (1926) 31 C. W. N. 448.

(2) (1940) 45 C. W. N. 57.

the entry in the record of rights and since there was no documentary evidence subsequent to 1897 showing the plaintiff's possession, and the Record of Rights was clearly an important piece of evidence of possession, the appeal was remanded for rehearing.

In the later decision, their Lordships of the Privy Council emphasised the necessity for giving effect to the statutory presumption contained in section 135 J of the Bombay Land Revenue Code of 1879 (corresponding to the presumption under section 103 B of the Bengal Tenancy Act) and observed that where the Appellate Court had given no effect to that presumption, his finding was not binding upon the High Court in second appeal.

In the present case however, the matter is quite different. The whole dispute between the parties was whether the entry in the settlement record showing plot 4450 in the landlord's khatian and in forceful possession of the plaintiff was correct and the suit was brought for correction of the records after declaring plaintiff's title and confirming his possession. A specific issue was framed in the trial Court :—

"Is the C. S. Khatian in question liable to be corrected?" And in the Appellate Court one of the questions noted for decision was :

— "Is the record of rights correct?"

The entries in the settlement record formed the cause of action for the suit and there is, it seems to me ample indication in the judgments of both Courts that those entries were adequately considered. Both parties entered into evidence in support of their contentions, the plaintiffs to show that the entries so far as they related to title and possession were wrong the defendant to show that they were correct. It is true that neither Court noted specifically that the presumption of correctness of the Record of Rights had been rebutted but where there was a specific issue on the question of the correctness and it was definitely found on examination of the evidence of both parties that the entries were not correct, this necessarily implies in my opinion a finding that the presumption of correctness was rebutted. After all, the value of the Record of Rights is mainly with regard to the question of possession, and on that question it was already in favour of the plaintiffs so far as regards actual possession, only the entry that their possession was forceful was found to be incorrect ; and when on the question of title both parties produce the evidence on which presumably the entry, so far as it relates

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to title, must have been based, the finding that plaintiffs' title had been established was really equivalent to a finding that the presumption had been rebutted. I find no reason therefore to suppose that the decision of the lower Courts was bad on this account.

The learned Advocate for the appellant has not cited any ruling relating directly to the second contention. Certain decisions were referred to which have been noted in Meunier's Evidence Act with regard to the recitals in documents between strangers and relating to land other than the land in suit. In the present case, however, the plaintiffs' Kabala is his document of title and has been found to cover the land in suit and it was executed by their predecessor in interest in their favour. It was in my opinion clearly admissible under section 13 of the Evidence Act. As the learned Additional District Judge has pointed out, it has not been sought to be used against the defendant landlord in respect of any matter of which admissibility is barred by the provisions of section 18A of the Bengal Tenancy Act. It is true that the recitals in the Kabala will not be binding on the landlord, but there is nothing to indicate that its evidentiary value has been misappreciated by the lower Courts. I see no reason for interference on this ground either.

The result is therefore that this appeal is dismissed with costs for the contesting respondents.

Leave to appeal under section 15 of the Letters Patent is refused.

S.K.B.; S.C.

Appeal dismissed.

CIVIL REVISION.

Before Mr. Justice R. F. Lodge.

BITHIKARANI TARWAL AND ANOTHER

v.

KHUDIRAM CHAKRAVARTY.*

Civil

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April, 2, 3.

Bengal Tenancy Act (VIII of 1885), sections 26F, 88—Right of pre-emption by co-sharer tenant—Express consent in writing by the landlord and each of the co-sharer tenants, whether must be made at the same time and in the same transaction.

The sole tenant of an occupancy holding comprising two C S. daga makes a division of it and sells the lands of the two daga thus separated to two different persons at different dates. The sole landlord recognised the new tenants of the two new separated holdings and granted receipts for each for the apportioned rent in his share. One of the new tenants sells his interest to a third party. The other new tenant claims the right of pre-emption.

Held: That there must be a consent to the division at one time but the consent in writing need not all be expressed at the same time.

That the express consent in writing given by the sole landlord at the time of division in 1942, that given by one of the two co-sharer tenants in October 1943 and that by the other in February 1944 were sufficient for the purposes of section 83(1) of the Bengal Tenancy Act to effect a valid division of the holding.

Application for Revision by one of the Co-sharer Tenants claiming pre-emption.

Application for pre-emption under section 26F of the Bengal Tenancy Act.

The material facts will appear from the judgment.

Messrs. Hiralal Chakravarty and Purnendu Sakher Basu for the Petitioners.

Messrs. Hemendra Chandra Sen, Gopendra Nath Das and Dwijendra Nath Mukherjee for the Opposite party.

The following judgment was delivered :

*Civil Revision Case No 1776 of 1945, against the decision of B. M. Mitra, Esq., Additional District Judge, 2nd Court, Midnapore, dated the 24th May, 1945, reversing the decision of Shri Chandra Dutt, Esq., Munsiff, 3rd Court, Midnapore, dated the 11th December, 1944.

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v.
Khudiram
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April, 3.

Lodge, J. :—The material facts may be stated briefly. One Kalibala was in possession of an occupancy holding which comprised two plots C. S. Dags Nos. 68 and 69, and measured .06 acre in area. On June 24, 1941, Kalibala sold C. S. plot No. 69 measuring .04 acre to Kananbala. In the following year 1942 the landlord granted a rent receipt to Kananbala in respect of C. S. Dag No. 69 only for a rent of Re. 1-1-0 which was exactly $\frac{2}{3}$ of the rents of the original holding and on the same day he granted a rent receipt to Kalibala in respect of C. S. Dag No. 68 for a rental of $\frac{1}{8}$ of 6 pies being $\frac{1}{3}$ of the rent of the original holding. On October 24, 1943, Kalibala sold the remaining plot, C. S. plot No. 68 to Gangabala, the mother of the petitioners in the present case. In that kobala it was stated that there were no co-sharers in the holding and the holding was described as C. S. Dag No. 68 measuring .02 acre in area, with a rental of $\frac{1}{8}$ of 6 pies.

On February 1, 1944, Kananbala in her turn sold to Khudiram C. S. plot No. 69 and in the kobala it was stated that the occupancy holding consisted of C. S. Plot No. 69 and bore a rental of Re. 1-1-0 and that there were no co-sharers. Thereafter Gangabala applied under section 20F of the Bengal Tenancy Act for an order that the portion transferred to Khudiram be transferred to herself. The learned Munsiff allowed the prayer and directed that the portion transferred by Kananbala to Khudiram be transferred to Gangabala. Khudiram appealed against that order. The learned Additional District Judge allowed the appeal and set aside the order of the Munsiff. The learned Additional District Judge held that there had been a valid division of the original occupancy holding and that when Khudiram purchased, he purchased the entire occupancy holding and Gangabala was not a co-sharer of that holding. The learned Judge also observed that Gangabala was estopped from denying that the holding had been validly split up. Gangabala's heirs have obtained this Rule.

The whole question is whether the original tenancy comprising C. S. Dags Nos. 68 and 69 had been validly divided or whether at the time of Khudiram's purchase Gangabala was a co-sharer in the occupancy holding, a portion of which was purchased by Khudiram.

As pointed out above the landlord granted dakhilas to both Kananbala and Kalibala on the same day in the year 1942 which dakhilas indicate that there had been a division of the holding,

a division which in fact had been consented to by the landlords and by Kalibala Kananbala, that is, there had been a division and there had been consent in fact by the landlord and by all the co-sharer tenants.

Section 88(1) of the Bengal Tenancy Act as amended in the year 1938 provides as follows :—

"Save as provided elsewhere in this section, a division of a tenure or holding or a distribution of the rent payable in respect thereof shall not be valid unless such division or distribution has been expressly consented to in writing by both—

(a) the landlord or the entire body of landlords or their agents duly authorised in that behalf, and

(b) all the co-sharer tenants".

It is conceded that in view of the proviso to section 88(1) and in view of the dakhilas granted to Kananbala and Kalibala in the year 1942, it may be presumed that the sole landlord gave his express consent in writing to the division. The question is whether all the co-sharer tenants have expressly consented in writing to the division and whether their express consent in the circumstances is sufficient for the purpose of effecting a valid division of the holding.

In the kobala dated October 24, 1943, Kalibala stated definitely that the holding which she transferred by that kobala consisted of C. S. Dag No. 68 only and measured .02 acre only and she stated definitely that it bore a rental of -/8/6 pies and that there were no co-sharers. The learned Additional District Judge in the Court of appeal below has held that this kobala contains an express consent in writing by Kalibala to the division of the tenancy. Similarly, Kananbala when she sold to Khudiram on February 1, 1944, described in her kobala the holding which she was selling as C. S. Dag No. 69 measuring .04 acre and bearing a rental of Re. 1-1-0 and she also stated in the kobala that there were no co-sharers. It seems to me that the learned Additional District Judge in the court of appeal below was right in holding that in this kobala also Kananbala expressly consented in writing to the division which took place in the year 1942. In this view it follows that there was in fact a division in the year 1942 to which the express consent in writing of the sole landlord was given at the time of the division, that the express consent in writing of one of the two co-sharer tenants was not given until October of the following year, and that the express

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consent of the second of the two co-sharer tenants was not given until February 1944.

It has been argued on behalf of the petitioner that the express consent in writing referred to in section 83 must be given by all the persons concerned, substantially at the same time that the consent of each of the persons must be part of one and the same transaction, that is to say, the landlord and all the co-sharer tenants must expressly consent in writing substantially at the same time and in the course of the same transaction to the division of the holding.

On the other hand it has been argued on behalf of the opposite party that the section does not require anything of the sort. All that the section provides is that a division agreed upon between the parties shall not be valid until it has been expressly consented to in writing by all the parties. I can see nothing in the language of the section which requires that the consent of all the parties concerned shall be given in writing at the same time. It is obvious that there must be a consent to the division at one time; but the consent in writing need not, in my opinion, all be expressed at the same time and I am of the opinion that the learned Judge was right in holding that the express consent in writing given by Kalibala in October 1943 and the express consent in writing given by Kananbala in February 1944, were sufficient for the purposes of section 83(1) of the Bengal Tenancy Act to effect a valid division of the holding to which the sole landlord had already expressly consented in writing.

In this view the learned Additional District Judge in the court below was right in holding that when Khodiram purchased in 1944, he purchased an entire occupancy holding and Gangabala was not then a co-sharer in a holding a portion of which only had been purchased by Khodiram.

In this view the order of the learned Additional District Judge is right and the Rule must be discharged.

The Rule is accordingly discharged with costs—hearing fee one gold mohur.

B. K. B. ; S. C.

Rule discharged.

APPELLATE CIVIL

Before Mr. Justice P. Chakravartti.

JAMILA KHATUN

v.

KSHETRA MOHON BISWAS.*

CIVIL

1946

July, 28, 30.

Lost grant—Presumption—Right of cremation—Evidence to dispute such grant, if permissible—Inhabitants of a village, if can be grantees of such grant—Essentials of a valid custom—Custom, whether must be universal or compulsory—Existence or reasonableness of custom, if a question of law—A decree for possession for exercising right of cremation or burial only against the owner, if bad in law.

Held: That the principle underlying the doctrine of lost grant is that when a certain right is found to have been exercised for a long period of time without interruption to the derogation of the right of some one, else the law, instead of disturbing such possession supports for it the best beginning that the law can give. It is, therefore, presumed as a kind of fiction that although no legal origin of the user which has been established as a fact can directly be proved it may legally be presumed that the origin lay in a grant made but since it was made, lost.

When the facts attract the doctrine of lost grant it is not permissible to give evidence to prove that such grant was never made, but the presumption cannot be drawn when it is clear that no grant could legally be made at all. In order that there could be a grant, it is necessary that there must have been a grantee capable of taking. Clearly the inhabitants of a village who are an indeterminate and unascertainable body of persons could not be grantees of any kind.

Asrabulla v. Kiamatulla Haji Choudhury (1) relied on.

Abdul Hossein v. Sadas Gobindo Deb (2) referred to.

A valid custom in order to be enforceable must refer to a particular plot of land or locality, to the particular nature of right enjoyed, to the particular persons in derogation of whose rights it is exercised and to a sufficient long user and it must also be reasonable.

A custom need not be universal nor compulsory. The fact that the people of a locality have enjoyed a custom does not mean that they are bound to exercise and follow it on every possible occasion and that if they do not do so on some occasions, the existence of the custom is negatived.

* Appeal from Appellate Decree No. 1180 of 1941, against the decree of N. L. Hindley, Esq., District Judge of Zillah Sylhet, dated the 31st March, 1941, affirming the decree of Kshetra Mohan Das, Munsiff, 2nd Court, Habiganj, dated the 25th September, 1940.

(1) (1937) 41 C. W. N. 503.

(2) (1938) 42 C. W. N. 1102.

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After the facts have been found, a question of the existence or reasonableness of the custom is a question of law. It cannot, therefore, be improper to decide the question of law in second appeal.

Asrabulla v Khamatulla Haji Chowdhury (1) relied on.

A decree for possession over certain plots of land for exercise of certain rights over these viz, the right of cremating and burying the dead bodies in derogation to the absolute right of the owner for khas possession is neither misleading nor bad in law.

Jegush Chandra Roy v. Niranjan De (2) referred to.

Appeal by the Defendant.

Suit for declaration of right for cremation and other ancillary reliefs.

The material facts will appear from the judgment.

Mr. Purushottam Chatterjee for the Appellant.

Mr. Biswara Kumar De for the Respondent.

The following judgment was delivered :

July. 30.

Chakravartti, J. :—The suit out of which this appeal arises was brought by the Hindu inhabitants of Hazra-Para and Hengumia-Para, which appeared to be two wards of a village called Bania-chong, for a declaration of their title to cremate the bodies of their adult dead in the two plots of land mentioned in the schedule to the plaint and, in the case of deceased infants, to bury the dead bodies there. Certain ancillary reliefs were also asked for. As usual in suits of this kind, after pleading immemorial user, the plaintiffs based their right both on a presumed grant and custom, as also several other matters less precisely defined.

This defence did not altogether deny the user of the land as alleged by the plaintiffs. It was admitted in the written statement of one of the defendants that such user had been going on since the Bengali year 1329. Further admissions came from the witnesses called by the defendants themselves. The sole attempt of the defendants seems to have been to reduce the period of user and to establish that it had been permissive.

Both the Courts below have decreed the plaintiffs' suit. They have found concurrently that the Hindu inhabitants of the two Paras have been exercising the right of burial and cremation on the two plots of land for at least the last 45 years continuously, publicly and as of right without the permission of the owners of

(1) (1937) 41 C. W. N. 503.

(2) (1934) 39 C. W. N. 397.

the plots. The trial Court on that finding held that the right claimed by the plaintiffs must be declared on the basis of both a lost grant and custom. The lower appellate Court, however, considered that the basis of a lost grant was quite sufficient and it was not necessary to consider the question of acquisition of the right by custom.

In the present appeal on behalf of the defendant it has been contended by Mr. Chatterjee that the lower appellate Court was in error in holding that the right claimed by the plaintiffs could be declared in their favour on the basis of a presumption of a lost grant. He contended that there could not be a grant in favour of the inhabitants of a certain place.

This contention, in my view, is plainly right. The principle underlying the doctrine of lost grant is that when a certain right is found to have been exercised for a long period of time without interruption to the derogation of the right of some one else, the law, instead of disturbing such possession, supposes for it the best beginning that the law can give. It is, therefore, presumed as a kind of fiction that although no legal origin of the user which has been established as a fact can directly be proved, it may legally be presumed that the origin lay in a grant made, but since it was made, lost. It is true that when the facts attract the doctrine of a lost grant, it is not permissible to give evidence to prove that such grant was never made, but the presumption cannot be drawn when it is clear that no grant could legally be made at all. In order that there could be a grant, it is necessary that there must have been a grantee capable of taking. Clearly the inhabitants of the village, who are an indeterminate and unascertainable body of persons, could not be grantees of any kind. This has been laid down in cases too numerous to mention, both in England and in India. It is sufficient for me to refer to the decision of a Division Bench of this Court in the case of *Asrabulla v. Khatmatulla Haji Choudhury* (1).

The ground upon which the lower appellate Court based its decision being an erroneous one, the next question is whether I should remand the case for the purpose of a re-hearing of the appeal on the question of custom. As I have stated already, the trial Court found in favour of the plaintiffs on the ground of custom as well, but the lower appellate Court did not consider this question at all. I think, however, that having regard to the elaborate character of the findings arrived at and recorded by both the Courts below,

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it is not necessary for me to order remand of the appeal; on the other hand, it would be legitimate for me to follow the course which Mr. Justice Jack followed in the case of *Abdul Hosain v. Sadai Gobinda Deb* (1), a case which was cited by Mr. Chatterjee himself. In that case too, the learned Judge held that the right there claimed by a fluctuating body of person could not be supported on the basis of a lost grant. Nevertheless, he upheld the decree which had been made by the Court of appeal below on the basis of a custom from the findings already recorded in the judgment under appeal.

In the present case, the two plots of land, in respect of which the custom is claimed to have been exercised, are precisely described. The nature of the right said to have been exercised is defined with equal precision. The persons in the derogation of whose rights custom was exercised are also certain and named. The three certainties which a valid custom requires are, therefore, all present. As regards the period over which the right has been exercised, the findings of the Court below is that it has been exercised at least for the space of 45 years. That period is quite sufficient to support the growth of a custom and it is not necessary to go further back in order to find immemorial user.

There remains, however, the question of reasonableness. Mr. Chatterjee argued with some plausibility that it could not be reasonable to invade somebody else's land and cremate or bury dead bodies there. Stated broadly in that fashion, that proposition would appear to be correct. But one has to judge the present case in the context of its own facts. The finding here is that the two plots of land are situated on two banks of an ancient tank which was excavated by some one at some date which is unknown. The banks of that tank, although they may have belonged to some one, were never brought under actual possession and were allowed to run wild and any one who chose might cut and remove the grass that grew thereon. Here was apparently one of those old abandoned tanks, of which one sees so many in Bengal, and the abandoned banks of an abandoned tank. With respect to lands of this character, it cannot be said that if it is used for the purpose of cremating the dead bodies of the people of the locality, or for the burial of their dead infants, the custom would be unreasonable. There would really be no invasion of the right of property of any one, because whoever the real owner might be, did not obviously treat the property as an asset of his in any real sense.

Mr. Chatterjee also contended that the evidence showed that

(1) (1938) 42 C. W. N. 1102.

the right was not exercised by all the Hindu inhabitants of the two Paras, nor by them on all occasions. He referred specifically to the evidence to the effect that the Gopes of the place had their own cremation ground. He referred also to the fact that there is some evidence to the effect that only the bodies of those persons were burnt or cremated in the two plots of land of whom no memorial was desired to be kept. It is only necessary to point out with regard to this contention that a custom need not be universal nor compulsory. The fact that the people of a locality have and have enjoyed a custom does not mean that they are bound to exercise and follow it on every possible occasion and that if they do not do so on some occasions, the existence of the custom is negatived. In my opinion, the objections raised by Mr. Chatterjee are without substance.

Mr. Chatterjee also referred to a sentence occurring in the evidence of P. W. 1 which reads as follows :

"We are not cremating dead bodies in the disputed land after the purchase of Kalikishore Dhar."

Basing himself on this sentence of the evidence, Mr. Chatterjee contended that on the plaintiff's own admission the custom had been discontinued since the lands were purchased by Kalikishore Dhar. On a reference to the evidence, however, it appears that the sentence does not bear the meaning which Mr. Chatterjee would attribute to it. It was stated in the written statement of one of the defendants that the practice of cremation and burial had commenced only after the purchase by Kalikishore Dhar. The sentence which I have quoted is obviously an answer to a question put to the witness with reference to that statement of the defence. He was asked whether it was not a fact that the people of the locality had been cremating their dead bodies only since the purchase by Kalikishore Dhar and he replied in the negative.

With regard to this matter, I have only to add that it is quite futile to contend at this time of the day that the custom of cremation and burial is not one of a fairly ancient origin or that its exercise has been irregular and spasmodic. As both the Courts below have pointed out in their judgments, there is evidence coming from the side of the defendants themselves that the custom has been in existence for at least 25 years. The admission contained in the statement has already been referred to.

On the findings which I have above referred to, it is in my opinion unnecessary to remand the appeal to the lower appellate Court for a fresh finding on custom. As was pointed out in the decision of the Division Bench to which I have already referred, namely, the

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case of *Asrabulla v. Kiamatulla Haji Choudhury* (1), after the facts have been found, a question of the existence or reasonableness of the custom is a question of law. It cannot, therefore, be improper to decide the question of law in second appeal. In my view, the evidence recorded by the Courts below are quite sufficient to support their decree on the basis of a customary right, possessing all the incidents necessary to make it valid.

Mr. Chatterjee, in the last place, complained of the form of the decree made by the trial Court. The decree, after declaring the right of the plaintiffs goes on to say that they will get possession in the disputed land as shown in the commissioner's map for the purpose of cremating and burying their dead bodies therein. Mr. Chatterjee contended that even if the plaintiffs were given a decree as respects the rights claimed by them, they would not thereby become owners of the two plots of land and a decree for possession in their favour was erroneous, or, at any rate, might prove misleading. I think, the Courts below have done all that was necessary to avoid a misleading impression by qualifying the order with the reservation that the possession of the plaintiffs would be only for the purpose of cremating and burying dead bodies therein. Since the plaintiffs were given a decree with regard to the entirety of the two plots of land, they were thereby declared entitled to exercise the right in every inch of the land. That being so, although the title of the land would remain with the defendants, any user by them which would interfere with the exercise of the plaintiffs' right, wherever they might choose to exercise it within the two plots, would be impossible. In the circumstances, I do not think that the decree gives the plaintiffs any thing more than they were entitled to. It is useful to notice that in the case of *Jogesh Chandra Roy v. Niranjan De* (2) the owner of certain lands sued for Khas possession against the person who claimed a right of cremation therein and such right having been established, the owner's claim for Khas possession was refused. The present case is a converse one, but effect is obviously the same.

For the reason given above, the appeal fails and is dismissed. As, however, the defendants had every reason to come up to this Court, I make no order as to costs against them.

M. K. ; S. C.

Appeal dismissed.

(1) (1937) 41 C. W. N. 503.

(2) (1934) 39 C. W. N. 387.

Before Mr. Justice R. C. Mitter and Mr. Justice
Mac C. Sharpe.

SM. PATTa KUMARI BIBI

v.

NIRMAL KUMAR SINHA NOWLAKHA.*

Suit, if lies—Remainderman suing life tenant for conversion of goods—Life tenant, if trustee for remainderman for goods in her possession—Secreting chattels—Breach of trust—Life tenant, if can be charged for waste—Permanent injury to reversionary right—Conversion—Civil Procedure Code (Act V of 1908), order 2 rule 2—Integrity of cause of action—Limitation Act (IX of 1908), section 10, schedule I, articles 36, 48, 49.

On the 13th February 1937, the respondent, instituted a suit, being No. 10 of 1937 against the appellant in respect of ornaments, jewelries etc. described in schedule K annexed to the plaint. He annexed another schedule, namely, schedule Kha, which consisted of certain items of schedule Ka, in respect of which the lady (appellant) had set up the case of theft. The prayers made were for discovery by the defendant (appellant) of the ornaments etc. and if she failed to do so, for a declaration that those mentioned in schedule Ka were the ornaments etc. dealt with in the award of the arbitrators appointed by the parties to settle the dispute between them, and for keeping them in the custody of the Court or of a receiver to be appointed by the Court. The story of theft was recited in the plaint and characterised as a false one. One of the defences was that the ornaments had been lost by theft. The suit was decreed in the primary Court. The date of cause of action was said to be 19th August 1936 when the plaintiff came to know of the false story of theft.

The defendant (appellant) appealed to High Court against that decree, being R. A. No. 229 of 1938. The judgment was delivered on the 27th November, 1941. The High Court held (a) that Patta Kumari had only a life interest in the ornaments etc. and that Nirmal Kumar (respondent) had a vested remainder therein; (b) that her (Patta Kumari's) plea of theft was a false one and that she was still in possession of them; (c) that a life tenant owes a duty to the remainderman to see that the subject is preserved, reasonable wear and tear being excepted; (d) that if there is a breach of that duty or if it be established that there is a reasonable apprehension on the part of the remainderman that that duty will not be performed by the life tenant he is not entitled to immediate possession but the Court must make suitable orders for the preservation of the property during the life of the life tenant. In the circumstances of the case the order made by the lower Court for the appointment of a receiver was discharged. Some articles were left in Patta Kumari's possession and the primary Court was directed to appoint a

* Appeal from Original Decree No. 202 of 1943, against the decree of Charu Chandra Basu, Esq., Subordinate Judge of Berhampore, dated the 4th February, 1943 in Suit No. 23 of 1939.

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commissioner and to call upon her to produce the remaining articles before him, who on production was to make a list etc.

It was admitted that after the decree of the primary Court passed in Suit No. 10 of 1937, and while Appeal No. 229 of 1938 was pending in the High Court, Nirmal Kumar took steps for causing the jewelleries etc. in respect of which the primary Court passed the decree, to be produced by her before the receiver. Patta Kumari, however, filed an application in the High Court in the said Appeal (No. 229 of 1938) supported by an affidavit stating that it would be impossible for her to produce them before the receiver as they were not in her possession but had been stolen.

While the said appeal was pending in the High Court and after the aforesaid application of Patta Kumari had been filed in the High Court, Nirmal Kumar filed on the 28th June 1939 the present suit and prayed for compensation. In paragraph 8 of the plaint he stated that Patta Kumari, the defendant, for the purpose of causing loss to him had after the institution of Suit No. 10 of 1937 kept concealed and removed most of the jewelleries. Paragraph 9 of the plaint ran as follows :

"That under the abovementioned circumstances and according to law and equity the defendant is liable to the plaintiff for conversion, waste and breach of trust and the plaintiff is entitled to get from the defendant adequate compensation for the same." Two dates were mentioned to be the dates when the cause of action arose, namely the 15th April, 1937, being the date on which the defendant filed his written statement in Suit No. 10 of 1937 and the 16th November, 1938, being the date when she filed her application in the High Court in connection with Appeal No. 229 of 1938 :

Held, that the duty which the defendant as life tenant owed, did not make her a trustee for the plaintiff, the remainderman. Hence there was no breach of trust by her in secreting the chattels.

That the defendant appellant could not be charged for waste as that term is understood, for the subject matter was not immovable property. It was a case of permanent injury by the defendant to the plaintiff's vested reversionary rights and as the plaintiff would not be able to find the articles by reason of wrongful act of the defendant, when he would be entitled to have possession.

That a person having a reversionary interest could sue, when by reason of trespass or other illegal act of the defendant, the plaintiff was deprived permanently of the benefit of his reversionary interest :

Mears v. The London and South Western Railway Company (1).

"The law of England as to trover and conversion in many senses a very technical law and it is largely put aside now in modern times" :

William Leitch & Co. v. Leyden (2) referred to.

That the act complained of by the plaintiff was "conversion" in this country.

(1) (1862) 11 C. B. N. S. 850 ; 31 L. J. C. P. 229 ; 142 E. R. 90 (102-3).

(2) [1931] A. C. 90 (102-103).

That the suit was not barred under order 2 rule 2 of the Code of Civil Procedure, as the causes of action of two suits, viz. Suit No. 10 of 1937 and the present suit are different.

That as the defendant was not a trustee for the plaintiff and as there was no trust, much less a trust for a specific purpose, section 10 of the Limitation Act was inapplicable.

The present case was either governed by Schedule I, Article 36, providing for 2 years limitation and the date from which limitation ran was the date of malfeasance of the defendant which would be when she refused to produce them before the receiver, and would be within time or under Schedule I Article 49—where the defendant had wrongfully detained the movable properties, in spite of a decree of Court she refused to produce and hand them over to the receiver when asked to do so. That refusal, which was on a false pretext, was on the 16th November, 1938 and so well within 3 years of the present suit :

Aiyappa Reddi v. Kuppusami (1) followed.

Rasee Bhayaji v. The S. S. Sabitri (2) and *Kripa Ram v. Kunwar Bahadur* (3) not followed.

Article 48 Schedule I of the Limitation Act contemplates suit by plaintiff who has the right to possession, that is to say, when he is entitled to immediate possession.

Appeal by the Defendant.

Suit for compensation.

Messrs. Pramatha Nath Mitter, Surathi Mohan Sanyal and Bijoy Kumar Bose for the Appellant.

Messrs. Panchanan Ghose and Parash Nath Mukherjee (Jr.) for the Respondent.

C. A. V.

The following judgment was delivered by

Mitter, J.:—Rai Dhanpat Singh Nowlakha of Azimgunj died intestate in the year 1914 leaving him surviving his widow, Patta Kumari Bibi, the appellant before us, two natural born sons and six daughters. Shortly after his death his two sons died. In pursuance of an authority given by him, Patta Kumari Bibi adopted Nirmal Kumar Singh Nowlakha, the respondent before us, in April 1918. The latter attained majority in 1919. In 1924 disputes and differences arose between him and his adoptive mother. Those disputes and differences were referred to the arbitration of two gentlemen, Dhannulal Suchanti and Askaran

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(1) (1904) I. L. R. 28 Mad. 208.

(2) (1886) I. L. R. 11 Bom. 133.

(3) (1932) I. L. R. 54 All. 467.

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Bhutaria. The arbitrators gave their award on the 13th January, 1924. Paragraph 9 which is the only material paragraph of the award for this appeal, dealt with the rights of the parties in respect of ornaments, jewellerys, gold mohurs, silver ware and utensils. No list, however, of the ornaments etc. dealt with in that paragraph was appended to the award or even made by the arbitrators. According to its terms those articles were left with Patta Kumari Bibi. A decree on the award was passed on the 21st January, 1924. In 1926 Patta Kumari's youngest daughter was married and she left the Azimgunj house and mostly lived in Calcutta, and elsewhere. From 1929 to 6th August, 1936 she paid only occasional visits to Azimgunj. On the 7th August, 1936 she went to her Azimgunj house. On the 17th August, 1936 a report was sent to the local Police Station that valuable jewellerys had been burgled from the strong room in the Azimgunj house during her absence and that she discovered the theft on the 10th August, 1936. The Police reported the case to be a false one. On the 13th February, 1937 Nirmal Kumar, the adopted son instituted a suit, being No. 10 of 1937 of the Court of the Subordinate Judge at Berhampore against her in respect of ornaments, jewellerys etc. described in Schedule Ka annexed to that plaint. He annexed another schedule, namely Schedule Kha, which consisted of certain items of Schedule Ka, in respect of which the lady had set up the case of theft. The plaint proceeded on the allegation that according to the award the defendant had only a life interest in them and that he, the plaintiff, was the remainderman. The prayers made were for discovery by the defendant of the ornaments etc. mentioned in paragraph 9 of the award, and, if she failed to do so, for a declaration that those mentioned in Schedule Ka were the ornaments etc. dealt with in that paragraph of the award, and for keeping them in the custody of the Court or of a receiver to be appointed by the Court. The story of theft was recited in the plaint and characterised as a false one. Other reliefs claimed need not be recited. Many defences were put forward, one of them being, that the ornaments had been lost by theft. The learned Subordinate Judge decreed the suit in part on the 31st May, 1938. He found that the ornaments etc. described in Schedule Kha of that plaint, except certain items mentioned in his judgment, were those that had been dealt with in paragraph 9 of the award. He further found that the plea of theft set up by her was a false one and that she was still in possession of them and directed a receiver to be appointed to take charge of them for safe custody and

preservation. The defendant took an appeal to this Court, being Appeal from Original Decree No. 229 of 1938. The judgment of this Court, which is reported in 46 C. W. N. 333, was delivered on the 27th November, 1941. This Court held: (1) that Patta Kumari had only a life interest in the ornaments etc. in respect of which the learned Subordinate Judge had passed his decree and that Nirmal Kumar Sinha Nowlakha had a vested remainder therein; (2) that her plea of theft was a false one and that she was still in possession of them; (3) that a life tenant owes a duty to the remainderman to see that the subject is preserved, reasonable wear and tear being excepted; (4) that if there is a breach of that duty or if it is established that there is a reasonable apprehension on the part of the remainderman that that duty will not be performed by the life tenant he is not entitled to immediate possession but the Court must make suitable orders for the preservation of the property during the life of the life tenant. In the circumstances of the case the order made by the learned Subordinate Judge for the appointment of a receiver was discharged. Some articles were left in Patta Kumari's possession and the learned Subordinate Judge was directed to appoint a commissioner and to call upon her to produce the remaining articles before him, who on production was to make a list, to put them in a strong box and to deposit the box in the safe custody of a bank to be selected by the learned Subordinate Judge. The date of the cause of action in that suit was stated to be the 19th August, 1936, when the plaintiff came to know of the false story of theft.

It is admitted that after the decree of the learned Subordinate Judge passed in Suit No. 10 of 1937, and while appeal No. 229 of 1938, filed by Patta Kumari against that decree was pending in this Court, Nirmal Kumar took steps for causing the jewellery etc. in respect of which the Subordinate Judge had passed the decree to be produced by her before the receiver. Patta Kumari, however, filed an application in this Court in the said appeal supported by an affidavit stating that it would be impossible for her to produce them before the receiver as they were not in her possession but had been stolen. While the said appeal was pending in this Court but after the aforesaid application had been filed in this Court by Patta Kumari, Nirmal Kumar filed on the 28th June, 1939, the suit in which this appeal arises. He prayed for compensation amounting to Rs. 150,000. In the plaint he recited the award in respect of the jewellery etc., the story of theft set up by Patta Kumari, gave a summary of the

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plaint of suit No. 10 of 1937 and reliefs claimed by him in that suit, and the terms of the decree passed by the Subordinate Judge. He also stated that the appeal preferred by Patta Kumari against that decree and cross objections filed by him were pending in this Court. In paragraph 8 he stated that Patta Kumari, the defendant, for the purpose of causing loss to him had after the institution of Suit No. 10 of 1937 kept concealed and removed most of the jewellery. Paragraph 9 of the plaint runs as follows :—

“That under the above mentioned circumstances and according to law and equity the defendant is liable to the plaintiff for conversion, waste and breach of trust and the plaintiff is entitled to get from the defendant adequate compensation for the same”. Two dates have been mentioned to be the dates when the cause of action arose, namely, the 15th April, 1937, being the date, on which the defendant filed her written statement in suit No. 10 of 1937, and the 16th November, 1938, being the date when she filed her application in this Court in connection with appeal No. 229 of 1938 wherein she had stated that it was impossible for her to produce the jewellery etc., before the receiver as directed by the decree of the Subordinate Judge on the ground they were not in her possession having been taken away by a thief. The learned Subordinate Judge decreed the suit for Rs. 73,239-2-0 with costs. Patta Kumari has preferred this appeal. Her advocate has raised before us the following contentions and no others, namely

I. That the suit as framed does not lie ;

II. That at any rate the suit is not maintainable in view of the provisions of Order 2 rule 2 of the Code of Civil Procedure ; and

III. That in any event it is barred by time.

The amount of the compensation decreed has not been questioned before us.

I. - In suit No. 10 of 1937, it was decided that the defendant had a life interest in the properties in suit now and the plaintiff had a vested remainder therein. Those findings are resjudicata. The duty which the defendant as life tenant owed and owes to the plaintiff, the remainderman, does not make her a trustee for the plaintiff. There is therefore no breach of trust by her in secreting the chattels. The defendant cannot be charged for waste as that term is understood, for the subject matter is not immoveable property. It is therefore the case of a life tenant who with the intention of defeating the rights of the remainderman in immoveable property has done away with the property.

It is a case of permanent injury by the defendant to the plaintiff's vested reversionary rights. This has also been established by the evidence, for even after the decree of this Court passed in suit No. 10 of 1937, she refused to produce the things before the commissioner when she was directed by the Court below to do so in pursuance of the decree passed on the plea, which was found to be false, namely, that the things had been taken away by theft. It is quite clear that the defendant has either effectively concealed the articles or has made them over to some body or sold them to some one, and those persons cannot be traced by the plaintiff. In any of those cases the result to the plaintiff is the same, for he would not be able to find the articles by reason of a wrongful act of the defendant, when he would be entitled to have possession. The learned advocate appearing for her however takes his stand on the statements made in paragraph 9 of the plaint. He contends that breach of trust and waste being out of the way the plaintiff has to rely on his case of conversion, and he cannot succeed on that case as he is not entitled to immediate possession.

We have already held that the defendant was not a trustee for the plaintiff and the word "waste" used in paragraph 9 of the plaint is a misnomer. The technical conception in England of conversion is that it is a wrong to possession, trover would accordingly lie in England against a defendant when the latter either by wrongly taking or wrongly detaining or destroying or by wrongly disposing of a chattel has deprived the plaintiff of its use. A conversion according to that conception is the act of wilfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it. So an action in trover would not lie at the suit of a person unless he is in actual possession or entitled at the time of the conversion to the immediate possession of the chattel. This proposition is well-established by a long line of decisions in England given before the Judicature Act. But it is quite a different thing to say that a person having a reversionary interest cannot sue, when by reason of trespass or other illegal act of the defendant he has been deprived permanently of the benefit of his reversionary interest. That he can sue and get a decree has been decided in England as long back as 1862 in *Mears v. The London and South Western Railway Company* (1) and that decision has since then been treated as good authority (Salmond on Torts, 9th Edn. p. 357). The words used in para-

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(1) (1862) 11 C. B. N. S. 850; 31 L. J. C. P. 229; 148 E. R. 1929.

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graph 9 of the plaint especially the words "waste and conversion", may have been illchosen, but paragraph 9 of the plaint states what, according to the plaintiff's opinion, are the legal effect of the wrongful acts attributed to the defendant. The suit cannot be thrown out on those statements but we ourselves must consider what would be the legal effect of those acts. We do not, moreover, see any reason why the act complained of by the plaintiff cannot be termed 'conversion' in this country. At page 371 Sir Frederic Pollock observes thus :

"But an owner not entitled to immediate possession might have a special action on the case, not being trover for any permanent injury to his interest, though the wrongful act might also be trespass, conversion, or breach of contract as against the immediate possessor. As under the Judicature Act the difference in form between trover and special action which is not trover does not exist, there seems to be no good reason why the idea and the name of conversion should not be extended to cover these last mentioned cases" (Pollock on Torts 13th Edition pages 371 and 372).

The material facts have been pleaded in the plaint, and if those facts are established, and we hold they have been established, they would entitle the plaintiff to get compensation. After all "the law of England as to trover and conversion, is in many senses, a very technical law, and it is largely put aside now in modern times." (Per Viscount Dunedin in *William Leitch & Co. v. Leydon* (1). We accordingly overrule the first contention urged by the appellant's advocate.

II. We are not also impressed by his argument in support of the second contention. In order that order II rule 2 of the Code of Civil Procedure may bar this suit, the cause of action of this suit and of Suit No. 10 of 1937 must be the same. Apart from the explanation to that rule, which is not material to the case before us, it is the identity of the cause of action that matters. We do not see how the cause of action on the facts pleaded in the case before us is identical with that in Suit No. 10 of 1937. That was a *quia timet* action. In that suit the plaintiff had pleaded that he had reasonable apprehension that the defendant has been harbouring the intention of causing injury to his reversionary rights in certain articles of jewellery etc. and asked the Court to *prevent* the defendant from carrying into effect her wrongful intentions. In this case the cause of action pleaded is that after the institution of that suit

the defendant *has in fact destroyed* his reversionary rights to those articles of jewellery etc. by her wrongful acts. The causes of action in the two suits are different. This contention of the appellant is also overruled.

III. The third contention raises a more substantial question of law. The defendant is not a trustee for the plaintiff. There is no trust, much less a trust for a specific purpose. Section 10 of the Indian Limitation Act is accordingly not applicable. Article 36 of the First Schedule to the Limitation Act, which provides for two years' limitation, would be applicable unless any other Article is applicable—namely either Article 48 or 49. The further question is that even if the residuary Article dealing with torts, namely Article 36, is applicable what in this case would be the starting point of limitation.

We do not think that the case comes within Article 48 of the Limitation Act. It was pointed out by Das J. in *Lodna Colliery Ltd., v. Bipin Behari Bose* (1) and his observations were approved by the Judicial Committee in *Pugh v. Ashutosh Sen* (2), that Article 48 deals only with specific moveable property which falls under one of two classes, namely (1) such property as has been lost or (2) as has been acquired by (a) theft, (b) dishonest misappropriation or (c) conversion. Lord Warrington of Clyffe further held in *Pugh's Case* (2) that the word "conversion" in the first column of the Article has the same meaning as it has in the law of torts. In our opinion the first and the third columns must be read together, and if that is done it is clear beyond doubt that Article 48 contemplates suits by plaintiffs who have the right to possession, that is to say where they are entitled to immediate possession. Article 49, which also deals with specific moveables, does not, however, contain the word "conversion", and there is nothing to indicate *ex facie* that that Article is intended to apply only to such suits as are covered by the 1st column where the plaintiff has the right to immediate possession. There are, however, some decisions which have the effect of limiting that Article to cases of compensation for wrongful acts of the defendant in respect of moveables other than those acts enumerated in Article 48 when the plaintiff has the right to possession. This result has been arrived at by giving to the word "specific" in the phrase "specific moveable property" a meaning other than its plain dictionary meaning. The first and the leading decision is that

(1) (1920) 55 I. C. 113 (133.)

(2) (1928) L. R. 56 I. A. 93; 49 C. L. J. 415.

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of the Bombay High Court in *Essoo Bhayaji v. The Steamship Savitri* (1). In that case the plaintiff sued for damages for the loss of his barge which was sunk by the S. S. Savitri colliding with it. Farran, J. held that Article 49 could not apply where the plaintiff was in possession at the time of the wrongful act of the defendant. He observed that the word "Specific" applied to property in one's own possession was meaningless and the phrase "Specific moveable property" was "only apt when the thing to which you are entitled is in the possession of a third party." He noticed the dictionary meaning, which is "tending to specify or make particular definite, limited, precise", but held that the word "Specific" as used in Article 49 has not that meaning. It meant property of which "the owner was entitled to demand a return in specie." So far as *Essoo Bhayaji* case (1) is concerned the actual point decided is that Article 49 applies only when at the time of the wrongful act the moveable property was in the possession of a third person, a person other than the owner. But Farran, J.'s definition of the phrase "Specific moveable property" used in Article 49 has been utilised in some of the later decisions for the purpose of limiting that Article, as well as Article 48, to cases where the plaintiff had the right to possession. Where he had no such right those Articles were held inapplicable. *Kripa Ram v. Kunwar Bahadur* (2). In *Surat Lall Mondal v. Umar Haji* (3) one of three Judges and in *Swarnamoyee Dassy v. Prabodh Chandra Sarkar* (4) a Division Bench of this Court adopted the definition given by Farran, J. in *Essoo Bhayaji's* case (1), but in neither case was it necessary, nor was it utilised for the same purpose as was done by the Allahabad High Court in *Kripa Ram's* case (2). It is not necessary to rely on the word "Specific" used in Article 48 and to give it a special meaning in order to hold that that Article contemplates suits by a plaintiff who has the right to possession of the article lost or acquired by conversion etc. for the word "conversion" in the light of the observations made by the Judicial Committee in *Pugh's* case (5), and more so the third column of that Article makes the position clear. There is accordingly no decision of this Court to which our attention has been drawn and which is binding on us which holds that Article 49 can be invoked to

(1) (1886) I. L. F. 11 Bom. 133.

(2) (1932) I. L. F. 54 All. 467.

(3) (1895) I. L. F. 22 Cal. 877.

(4) (1932) 36 C. W. N. 758.

(5) (1928) L. R. 56 L. A. 93; 49 C. L. J. 415.

suits of the description mentioned in column 1 of that Article but only when the plaintiff is entitled to immediate possession. We prefer to give to the word "Specific" occurring in that Article its ordinary dictionary meaning and to follow the decision in *Aiyappa Reddi v. Kuppusami* (1) where Article 49 was applied to a case where the plaintiff had no right to immediate possession at the time when the cause of action pleaded by him had arisen and on which he succeeded. We hold that the case before us is a case where the defendant has wrongfully detained the moveable properties, for inspite of a decree of Court she has refused to produce and hand them over to the receiver when asked to do so. That refusal, which was on a false pretext, was on the 16th November, 1938 and so well within three years of this suit. The detention though in form was against the receiver was in substance against the plaintiff, for the concealment was intended to be for all times to come. Even if Article 49 is not applicable the case would fall within the residuary Article, namely Article 36, but the malfeasance of the defendant would be when she refused to produce them before the receiver. That date is within two years of the suit. We hold that the suit is not barred by time.

The result is that this appeal is dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1904) I. L. R. 28 Mad. 208.

Before Mr Justice Mac C. Sharpe.

SUGAN MAL CHORARI AND ANOTHER

v.

PROKASH GOBINDA MAJUMDAR AND OTHERS.*

Rent, suit for—Title—Correctness of Settlement Khatian, if can be questioned for the first time in second appeal—Objection as to non-registration of khatiat, if can be taken for the first time in second appeal—Unregistered Khatiat, if admissible in evidence—Bengal Tenancy Act (VIII of 1885), section 29 (a).

When there was no dispute at the time of trial or before the lower appellate Court, that the relationship of landlord and tenants existed between

*Appeal from Appellate Decree No 806 of 1940, against the decree of S. K. Sen Esq., District Judge of Rangpur, dated the 10th February, 1940, affirming that of Amlul Islam Esq., Munsiff, 1st Court, Rangpur, dated the 13th September, 1939.

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them, that the defendants claimed to be, and the landlord by suing for rent admitted them to be his tenants and the only question was the rate of rent :

Held, that the question of title need not be decided except in so far as it was necessary to do so in order to decide the rate.

The High Court should not, in second appeal, interfere with the conclusion of Courts below as to the correctness of the entry in the Settlement Khatian merely on the ground of misappreciation of evidence.

The presumption of correctness of entry in the Settlement Khatian was rebuttable and the presumption could not be maintained if it appeared that the foundation for the entry was erroneous or non-existent in law.

An objection as to reception of unregistered Kabuliya can for the first time be taken in second appeal.

Where an unregistered Kabuliya appeared to be a document which created a fresh settlement and the basis of recognition of tenant was the agreement for the payment of the enhanced rent :

Held, that it was inadmissible in evidence.

That even if the document that is, the unregistered Kabuliya, could be construed as a simple agreement for enhancement of rent, it could not form the basis for enhancement under section 29(a) of the Bengal Tenancy Act, being unregistered.

In this case the suit was for rent for 1342-45 B.S. :

Held, that payment of rent for the years 1336, 1338 and 1340 B.S. would not remedy the defect of unregistration under section 29(a) of the Bengal Tenancy Act.

Appeal by the Defendants Nos. 2 and 3.

Suit for rent

The material facts appear from the judgment.

Mr. Lala Hemanta Kumar for the Appellants.

Mr. Priya Nath Bhattacharya for the Respondents.

Mr. Ramendra Mohan Majumdar for the Deputy Registrar.

C. A. V.

The following judgment was delivered :

March, 10.

Sharpe, J. :—Defendants 2 and 3 are the appellants, and the appeal arises out of a suit for recovery of rent for the years 1342-45 B. S. of a holding which had been mortgaged to them by Nirasha, brother of Tungrimal, defendant 1. At the time of the mortgage, the holding had a rent of Rs. 7-4, but rent in the suit was claimed at the rate of Rs. 8-2-6 on the basis of a kabuliya, Ext. 7, executed by Tungrimal alone on 3rd Baisakh 1336 B. S. According to that kabuliya there had been an amicable partition

of property between Nirasha and Tungrimai, whereby the holding in suit was allotted to the exclusive share of Tungrimai and at Tungrimai's request the landlords, plaintiffs of the rent suit, gave her a new settlement at a rent of Rs. 8-2-6, which represented an enhancement of 2 annas in the rupee of the old rent. In the Settlement Khatian, the holding was recorded in the name of Tungrimai at a rent of Rs. 8-2-6 and it showed the names of defendants 2 and 3 as purchasers in execution of the mortgage decree, which they had obtained against Nirasha in mortgage suit No. 353 of 1929.

The plaintiffs consequently sued for recovery of rent of Rs. 8-2-6 with the usual cess and damages, making defendants 1, 2 and 3 parties. The suit was contested by defendants 2, 3 only. They contended that the rent was Rs. 7-4, that defendant 1 had no interest in the suit land and was not a necessary party. The learned Munsif who tried the suit decided all these points against the defendants, holding that the settlement khatian supported the claim of the plaintiffs as to the rate of rent and the amicable partition between Nirasha and Tungrimai, by which Tungrimai became the exclusive owner, and that the presumption of its correctness had not been rebutted. Consequently he decreed the suit in full, on contest against defendants 2 and 3, ex parte against the other defendants.

An appeal by the defendants 2 and 3 was dismissed by the learned District Judge of Rangpur. In his judgment, he noted that there was no satisfactory evidence as to the amicable partition, and that there was some suspicion about the genuineness of the amicable partition, but he held that the correctness of the entry in the khatian as to the rate of rent had not been rebutted, and consequently dismissed the appeal.

Three points have been urged on behalf of the appellants :—

- (1) As the holding according to the plaintiffs belonged originally to Tungrimai and Nirasha, the rent could not be altered by Tungrimai alone in the absence of proof of amicable partition.
- (2) The Kabuliyat, Ext. 1, on which the plaintiffs rely for proving the amicable partition is inadmissible in evidence by reason of section 49 of the Indian Registration Act, since it is not registered and since it purports to make a new settlement.
- (3) Even if the Kabuliyat be held to be only an instrument enhancing the rent, it is inadmissible in view of the provisions of section 29 of the Bengal Tenancy Act.

On behalf of the respondents it is contended that the objec-

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tion in regard to the admissibility in evidence of the Kabuliya should not be entertained in second appeal since no objection was taken to its admissibility at any earlier stage of the proceedings. In any event, it is urged that the contentions of the appellants relate to matters concerning the title of the defendants and should not be decided in a simple rent suit in which the only question for decision is whether the relationship of landlord and tenant exists between the plaintiffs and defendant and whether the alleged arrears of rent are due as unpaid. *Lodai Mollah v. Kalty Dass Roy* (1).

A further argument advanced was that both Courts having held that the correctness of the entries in the record of rights had not been rebutted, this finding cannot be challenged in second appeal: *Gour Chandra Chuckerbutty v. Birendra Kishore Manikya* (2).

On the whole it seems to me that the contentions of the appellants must prevail. There was no dispute at the time of trial, or before the lower appellate Court, that the relationship of landlord and tenant exists between the parties; the defendants claimed to be and the landlord by suing for rent admitted them to be his tenants. The only question was and is the rate of rent, and question of title need not be decided except in so far as it is necessary to do so in order to decide the rate. Admittedly the rent was Rs. 7-4 formerly, and the question whether rent could be recovered at the enhanced rate of Rs. 8-2-6 depends on two factors. (1) whether there had been an amicable partition which would authorise the defendant Tungrimai alone to agree to an enhancement and (2) whether such enhancement was legally payable. As regards the first question, the learned District Judge has not expressed any clear finding; on the whole he seems to distrust the story of an amicable partition but he bases his conclusion on the view that the correctness of the entry in the Settlement Khata^{or} has not been rebutted. In view of this conclusion, reinforced by a similar conclusion of the trial Court, this Court should not lightly interfere in second appeal and would not interfere merely on the ground of misappreciation of evidence. It is clear however that the presumption of correctness is rebuttable, and the presumption cannot be maintained if it appears that the foundation for the entries is erroneous or non-existent-in-law. The foundation in the present case is the Kabuliya Ext. 1. That is an unregistered document, and although no previous

(1) (1881) I. L. R. 8 Calc. 238.

(2) (1917) 25 C. W. N. 449.

objection was taken in regard to its admissibility, the appellants cannot in my opinion be debarred from raising this objection, even though belated. The Kabulyat appears to be mainly a document which creates a fresh settlement, the basis of recognition of Tungrimal being the agreement for the payment of the enhanced rent at the rate of Rs. 8-2-6 and in that view to be inadmissible in evidence. Even if the document could be construed as a simple agreement for enhancement of rent it cannot form the basis for enhancement, according to condition (a) of section 29 of the Bengal Tenancy Act since it is not registered. The omission to effect registration would not of course debar the landlord from recovering rent at the enhanced rate if it was established that rent had been actually paid at the enhanced rate for a continuous period of not less than 3 years immediately preceding the period 1342-45 B. S. for which rent is claimed. The evidence offered was however only that rent had been paid at this enhanced rate for the years 1336, 1338 and 1340 B. S. as noted by the learned District Judge. Payment of rent for these isolated years will not remedy the defect in the instrument of agreement for enhancement of rent. In these circumstances the claim for rent at the enhanced rate has not been substantiated and consequently the plaintiffs can recover rent at the admitted rate of Rs. 7-4 only.

The result is that this appeal is allowed. The plaintiffs will get a decree for rent at the rate of Rs. 7-4 per annum for the period of suit, i.e. for the years 1342-45 B. S. with cess and damages at the usual rates and costs of the trial Court, on contest against defendants 2 and 3 and exparte against the other defendants. There will however be no order as to the costs of the lower appellate Court or of this Court.

A. T. M.

Appeal allowed.

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Sharma, J.

*Before Mr. Justice P. Chakravarti and Mr. Justice
T. H. Ellis.*

ROHINI KUMAR ROY AND OTHERS

v.

UDAY CHAND MAHATAB MAHARAJADHIRAJ
BAHADUR.*

Civil.

1947.

April, 30.

*Execution—Composite decree—Decree for specific performance of contract for
pattai settlement and rent—Execution sought against other properties
of the judgment-debtor—Bengal Tenancy Act (VIII of 1885), sec-
tion 168A.*

In a suit for specific performance of the contract for pattai settlement and for a money decree either for rent or for damages by the superior proprietor of the tenure, following decree was passed: The prayer for specific performance was allowed and the plaintiff would get the amount claimed. This decree was sought to be executed and so far as the money portion was concerned, execution was sought to be levied against properties other than the tenure in suit. The objection of the appellants judgment debtors was that under section 168A of the Bengal Tenancy Act, the decree being one for arrears of rent, could not be executed by the attachment or sale of any property of the judgment-debtors other than the tenure to which the decree related:

Held, that the decree was not passed for any sum of money on account of damages but for amount as rent and was linked up with the decree for specific performance.

That the decree-holder was not entitled to break up the integrity of the decree and treat the money decree a simple money decree.

That in so far as execution was concerned with the realisation of the sum decreed out of other properties of the judgment-debtor, under section 168A of the Bengal Tenancy Act the decree-holder could not realise the money out of other properties of the judgment-debtor. He could realise it by attachment or sale of the tenure (pattai) in suit.

Appeal by the Judgment-debtors.

Application for execution of portion of a composite decree.

The other facts are stated in the judgment.

Mr. S. C. Jana for the Appellants.

Mr. Purushottam Chatterjee for the Respondent.

*Appeal from Original Order No. 46 of 1946, with Application and Civil Rule No. 409 (M) of 1946, against the order of Renupada Mukherjee Esq., Subordinate Judge, 2nd Court, of Hooghly in Miscellaneous Case No. 37 of 1945, dated the 27th November, 1945.

The judgments of the Court were as follows :

Chakravartti, J. :—This appeal is on behalf of the judgment-debtors and is directed against an order dated the 27th November, 1945, passed by the learned Second Subordinate Judge of Hooghly by which an objection preferred by the appellants under section 168A of the Bengal Tenancy Act was rejected.

The material facts are the following. On the 9th June, 1943, the respondent brought a suit, being Title Suit No. 2 of 1943, in the Court of the Second Subordinate Judge of Hooghly, asking for specific performance of a contract as also the recovery of a sum of Rs. 1829-12-10 pias. The case upon which these claims were made was of a somewhat complicated character. Shortly stated, the plaintiff's case was that a certain patni, namely Lot Santoshpur was sold for the arrears of the Bengalee year 1342 and purchased by the appellants. The defaulting patnidar brought a suit for having that sale set aside but during the pendency of that suit the patni was sold again and purchased by a third party named Bata Krishna Mandal. This Bata Krishna Mandal was added as a party to the suit already brought by the old defaulting patnidar and ultimately by the decree passed in that suit both the second and the third patni sales were set aside. Then there was a fourth sale for default in respect of the Bengalee year 1345 and this time the patni was purchased by the respondent himself who was the superior proprietor. It was alleged in the plaint that after the respondent's purchase of the patni, the appellant approached him for a re-settlement with them and on the 14th November, 1939, an order, agreeing to such re-settlement, was made. The plaint proceeded to state that on the basis of that re-settlement the appellants went into possession of the patni and were recorded as patnidars in the papers of the respondent ; that they made certain payments as patnidars ; but that a large amount of the rent had fallen into arrears and the appellants had also not executed an indenture of lease as stipulated. On these allegations the plaintiff asked that a decree might be passed in his favour for specific performance of the contract for patni settlement and also a money decree on either of two alternative grounds. If it was held that the appellants were liable to perform specifically the contract for settlement of the patni, a decree might be passed against them for rent, but if the court held that the plaintiff was not entitled to specific performance, then a decree might be passed for a certain amount as damages.

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On that plaint an ex parte decree was passed on the 28th January, 1944. The prayer for specific performance was allowed and it was stated that "the plaintiff will get the amount claimed". The heading of the decree described the suit as one for specific performance of contract and recovery of arrears of rent and cesses with interest.

It was this decree which is being sought to be executed and so far as the money portion is concerned, execution is being sought to be levied against properties other than the tenure in question. The objection of the appellants which the learned Subordinate Judge has turned down was the obvious one under section 168A of the Bengal Tenancy Act, namely that the decree being one for arrears of rent, could not be executed by the attachment or sale of any property of the judgment debtors other than the tenure to which the decree related. The learned Judge held this contention to be untenable on the ground that since the specific performance decreed by the court had not yet taken place and since no registered indenture of lease had been executed there was no tenure yet and accordingly no objection under section 168A which presupposed existence of a tenure could possibly be maintained.

It was contended on behalf of the appellants that in taking the view which he did, the learned Judge really went behind the decree. The decree, it was said, was a decree for rent and the executing court was not at liberty to treat it as any other kind of decree. On behalf of the respondent it was contended that the view taken by the learned Judge below was right, since an objection under section 168A could only be taken by a tenant when there was or had been a tenancy but not where the tenancy had yet to come into existence. In aid of this argument it was contended that no patni tenure could come into existence in law until a registered indenture had been executed.

It appears to us that the contention between the parties can be disposed of on a short ground. It may be, as the learned Judge has observed, that no tenure has come into existence yet; but at the same time it cannot be overlooked that the decree which is being sought to be executed is a decree which gave effect to one of the prayers of the plaintiff and did not give effect to the other. The decree was not passed for any sum of money on account of damages; it was passed for an amount as rent and it was linked up with the decree for specific performance. The learned Advocate for the respondent was in our view, right in

saying that a decree for rent in the circumstances of the present case could be explained only on the basis that on the specific performance of the contract as ordered, the decree for money would become a decree for rent. But an answer to the claim of his client to execute the decree against other properties of the appellants can be found in that very circumstance. If the decree be a composite decree, directing the execution of an indenture of patni lease and making a decree for a sum of money as rent on the basis that the lease will be executed, the decree-holder cannot, in our view, separate the two so as to remove from the amount decreed its character of rent and then execute the decree against other properties of the judgment-debtor on the basis that it is not rent. The learned Advocate for the respondent contended that in order that section 168A might apply there must be a tenure or holding in existence. The matter is not altogether clear but taking the decree actually passed in the present case as it is, we find no reason why the section which speaks of "the decree for arrears of rent due in respect of a tenure or holding" cannot be said to apply in the present case and why the decree that is being sought to be executed cannot be said to be a decree in respect of a tenure or holding. Be that as it may, all that we are concerned to decide in the present appeal is whether the respondent is entitled to execute the money portions of the decree against properties of the appellants other than the tenure concerned. In our opinion, he is not. He must accept the decree as it is and accept the position that the amount awarded to him by it is rent. If the decree as decree for rent is up till now a decree of only a conditional character and will become a real decree for rent only after the indenture of lease has been executed, but he must wait for executing the money portion of the decree till he succeeds in obtaining a lease. Whether other defences will then be available to the appellants it is not necessary for us to say, nor is it necessary to make any reference to certain subsequent developments which were brought to our notice.

In our opinion, the respondent is not entitled to break up the integrity of the decree and treat the money portion as a simple decree for money, thus enabling himself to proceed in execution against any properties of the judgment-debtors. In so far as his present execution case relates to the realisation of this sum out of other properties of the judgment-debtors, the objection under section 168A must prevail and the execution case to that extent must be dismissed.

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Chakravorty, J.

For the reasons given above the appeal is allowed, the judgment and order of the learned Judge dated the 27th November, 1945, are set aside and it is ordered that the respondent's execution case in so far as it relates to the realisation of the decretal money out of other properties of the appellants be dismissed. The appellants are entitled to their costs from the respondent. The hearing fee is assessed at three gold mohurs.

No orders are necessary on the application and the connected Rule.

Ellis, J. : I agree.

A. T. M.

Appeal allowed.

Before Sir Arthur Trevor Harries, Chief Justice of Bengal.

BASANTA KUMAR ROY AND OTHERS

v.

TAHERADDI MONDOL AND ANOTHER.*

CIVIL.

1947.

July, 4.

Limitation—Bengal Agricultural Debtors (Amendment) Act (B. C. of 1942), section 37A subsection (2)—Possession of property delivered to decree-holder—Decree-holder leases out the same—Application by judgment-debtor under section 37A against decree-holder in time—Petition by judgment-debtor more than a year after the relevant date to Debt Settlement Board for addition of the lessees as parties—The lessees added as parties—Affirmed by Appellate Officer and District Judge—Revision to High Court, 1st Res.

Held: That the application by the judgment-debtor to the Debt Settlement Board against the decree-holder was within the time mentioned under subsection (2) section 37A of the Act but the petition for relief against the lessees by adding them as parties was barred by limitation as it was made beyond the period allowed.

Application for Revision under section 115 of the Code of Civil Procedure.

Application under section 37A (2) of the Bengal Agricultural Debtors (Amendment) Act.

*Civil Rule No. 559 of 1947, against the order of the District Judge of Burdwan, dated the 14th of December, 1946, affirming the order of the Appellate Officer (S. D. O.) of Burdwan, dated the 29th of October, 1946.

The material facts will appear from the judgment.

Messrs. Manindya Nath Ghose and Hemanta Krishna Mitra
for the Petitioners.

Mr. Salahuddin for the Opposite Parties.

The following judgment was delivered :

HARRIES C. J. :—This is a petition brought by twelve petitioners for revision of an order of a learned District Judge affirming an order of an Appellate Officer who in turn affirmed an order of a Board passed in favour of a judgment-debtor in proceeding under section 37A of the Bengal Agricultural Debtors (Amendment) Act, 1942.

These proceedings were commenced by the judgment debtor against one person only, namely the Maharajadhiraj of Burdwan and there can be no question that that application was within limitation as provided for by sub-section (2) of section 37A. That sub-section provided that the application must be made within one year from the date of the commencement of the Bengal Agricultural Debtors (Amendment) Act, 1942 or from the date on which possession of the property was delivered to the decree-holder, whichever is later. The later date here is admittedly the date of the commencement of the Bengal Agricultural Debtors (Amendment) Act, 1942. That Act came into force on June 18, 1942. So an application would be within time if it was made at any time before June 18, 1943. As I have said, the application against the Maharajadhiraj was within time. The Maharajadhiraj's case was that he had settled this land with tenants before the material date, namely, December 20, 1939. In the year 1944, the Board added the present twelve petitioners as parties at the request of the judgment-debtor. The twelve petitioners protested that any application against them was clearly out of time but the Board proceeded and made an order in favour of the judgment-debtor and against all the petitioners. This order as I have said was upheld by the Appellate Officer and the learned District Judge.

The learned District Judge has, as is his custom in cases of this kind, disposed of the matter in a few lines. What his opinion was I am wholly unable to say, and I cannot say with certainty that he even appreciated the point that has been pressed before me. If he did, he does not honour me with his views on the point.

The short point taken before me is that application in so far as it concerns the petitioners was barred by sub-section (2) of

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section 37A. There was effective application against them until 1944 and no application in respect of this transaction could be made after June 18, 1943. It appears to me that any relief against the twelve petitioners was barred by limitation and no order should have been passed against them. Of course this does not affect any order which may have been passed against the Maharajadhiraj.

In the result, therefore, I allow this petition, set aside the order of the learned District Judge and direct that the judgment-debtors' application in so far as it concerns the twelve petitioners must stand dismissed.

The Rule is accordingly made absolute with costs.

S. C.

Rule made absolute.

CIVIL REVISION.

*Before Mr Justice P. B. Chakravarti and Mr. Justice
T. H. Ellis.*

BHOLANATH DUTTA

v.

LAYA MAJHI AND ANOTHER.*

CIVIL.

1947.

April, 16.

Jurisdiction—High Court—Bengal Alienation of Agricultural Land (Temporary Provisions) Act (V B. C. of 1944), section 4 (3)—Verified statement under, is a necessary prerequisite for Collector's jurisdiction—Section 10—Exclusive jurisdiction of Collector—Revision by District Judge, final.

Held: That the existence of a verified statement as required under section 4 (3) of the Bengal Alienation of Agricultural Land (Temporary Provisions) Act is not an essential prerequisite for Collector's jurisdiction as the petitioner is not debarred from proving his statements by adducing evidence.

That if the subject matter of the proceeding before the Collector was one which he was empowered to dispose of under the Act, the jurisdiction of the High Court and of all civil courts are altogether excluded.

*Civil Revision case No. 2156 of 1945, against the order of the District Judge of Midnapore, dated 10th August, 1945, confirming the order of the Subdivisional Officer of Jhargram, dated 3rd May, 1945.

The only remedy provided by the Act against the order passed by the Collector is an application to the District Judge but the order passed by him thereon shall be final.

If a party can establish that the subject matter of the proceeding before the Collector was one which he was not empowered to dispose of under the Act but that the Collector had yet proposed to do so, the High Court would have jurisdiction to interfere not however with the order of the Collector as such but with the order of the District Judge passed in revision if he too upheld the order.

Application for Revision under section 115 of the Code of Civil Procedure.

Application under section 8 (1) of the Bengal Alienation of Agricultural Land (Temporary Provisions) Act.

The material facts will appear from the judgment.

Mr. Apurba Charan Mukherjee for the Petitioner.

Messrs. Pashupati Ghosh and Upendra K. Roy for the Opposite Parties.

The judgment of the Court was delivered by

Chakravartti, J. :—This Rule is directed against the order dated the 10th August, 1945, passed by the learned District Judge of Midnapur by which he rejected an application in revision made to him under the proviso to section 10 of the Bengal Alienation of Agricultural Land (Temporary Provisions) Act (Bengal Act V of 1944). The order against which the said application in revision was directed was an order dated the 3rd of May, 1945, passed by the Sub-Divisional Officer of Jhargram under section 8 (1) of the special Act already referred to. It is complained by the petitioner that the Sub-Divisional Officer made an order not warranted by the Act and that the District Judge, in refusing to interfere with his order, proceeded on assumptions of fact which were erroneous.

A preliminary objection has been taken to the jurisdiction of the High Court to entertain the application on which the present Rule was issued. In our opinion, on the facts of the present case that objection must prevail.

The material facts are the following. It appears that on the 16th August, 1943, the opposite parties, who are members of an aboriginal tribe, obtained permission from the Collector under section 49 (F) of the Bengal Tenancy Act to sell certain of their lands in order to procure money for the purchase of other lands. They admitted that they had received from the petitioner a sum of Rs. 60 and, by the order granting them permission to sell the lands as prayed for, the Collector directed that the balance

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of the consideration should be paid in the presence of the Registrar, at the time of registration. Subsequently, on the 19th October, 1943, the petitioner completed the purchase and a document was executed the consideration being Rs. 250. In the kobala, the reason for selling the lands was stated to be the same as that mentioned in the application made to the Collector. The Bengal Alienation of Agricultural Land (Temporary Provisions) Act came into force on the 4th January, 1945. On the 18th February following, the opposite parties made an application under section 8 (1) of the said Act whereby they prayed that the lands sold by them to the petitioner might be restored to them and the transaction of sale might be converted into a usufructuary mortgage. It was stated in the opening sentence of the application that the petitioners were asking "for restoration of the agricultural lands sold by them during the year 1943 for the maintenance of themselves and their family." The application came to be disposed of finally on the 3rd May, 1945, when the Sub-Divisional officer made the order asked for "on," as is stated, "a joint petition of compromise". He placed it on record that the petitioner to this Court was absent, but his lawyer was present on his behalf.

Against this order of the Sub-Divisional Officer an application was made before the District Judge under the proviso to section 10 of the Act. The learned Judge, by his order dated the 10th August, 1945, rejected the application on two grounds. In the first place, he stated that the application made by the opposite parties contained a verified statement of the nature contemplated by sub-section (3) of section 4 of the Act and that the petitioner having adduced evidence in rebuttal, the order passed by the Sub-Divisional Officer was the only order which could possibly have been passed. In the second place, he observed that the order was one passed on compromise and on the evidence, the petitioner could not repudiate the compromise on the allegation that he was no party to it. It was against this order that the present Rule was issued.

Section 10 of the Bengal Alienation of Agricultural Lands (Temporary Provisions) Act provides as follows:

"Neither the High Court nor any Civil Court shall have jurisdiction in any matter which the Collector is empowered to dispose of under this Act.

"Provided that if any person who is dissatisfied with any order of the Collector made under section 4 or Sub-section (1) of sec-

tion 8 may within 30 days from the date of such order apply in the prescribed manner to the District Judge for the revision of such order and the decision of the District Judge thereon shall be final."

"Collector", as defined in the Act includes an officer appointed by the Provincial Government to discharge the functions of a Collector under the Act.

It is quite clear from the main provision of section 10 above set out that if the subject matter of the proceeding before the Collector was one which he was empowered to dispose of under the Act the jurisdiction of the High Court and of all Civil Courts are altogether excluded. The only remedy provided by the Act against the order passed by the Collector is an application to be made to the District Judge, but that remedy is subject to the qualification that the order which the District Judge may pass shall be final. Even apart from this last qualification, the section expressly excludes the jurisdiction of the High Court by the general language in the main part of the section, at least in cases which fall properly within the ambit of the Collector's powers.

It may however be said that if a party can establish that the subject matter of the proceeding before the Collector was one which he was not empowered to dispose of under the Act but that the Collector had yet proposed to do so, the High Court would have jurisdiction to interfere, not however with the order of the Collector as such, but with the order of the District Judge passed in revision if he too upheld the order. That was in fact what was said in the present case. Mr. Mukherjee who appeared for the petitioner contended that the application which the opposite parties made before the Collector was not accompanied by a verified statement as contemplated by sub section (3) of section 4. The statement there referred to is one to the effect that the petitioner could not have maintained himself or his family except by making the alienation of agricultural land which he wanted to have set aside. We are inclined to agree with Mr. Mukherjee that there was no such statement in the present case and that the learned District Judge was in error in assuming that there was. But the existence of such a statement is not one of the essential requisites necessary to attract the jurisdiction of the Collector. A statement as contemplated by sub-section (3) of section 4, if it is made along with the application only gives the applicant the benefit of a presumption. There is nothing in the Act to prevent him from proving that he could not have

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Chakravarti, J.

maintained himself or his family without making the disputed alienation by evidence adduced in the course of the proceeding. The whole argument of Mr. Mukherjee was that inasmuch as a statement of the kind contemplated by sub-section (3) of section 4 of the Act was wanting, there was an initial lack of the requisite material upon which only the Collector could regard himself as empowered to deal with the application.

We are entirely unable to accept this contention. The application, as already stated, most clearly mentioned the fact that the lands had been sold for the maintenance of the applicants and members of their family during the year 1943. It was also clear from the application, as was indeed the facts, that the consideration was Rs. 250. Those circumstances having been present, there was, in our opinion, nothing else that was required to attract the jurisdiction of the Collector under section 4 or section 8 of the Act. Whether he would ultimately allow the application or reject it on a consideration of the materials placed before him by the parties, was a different matter altogether, being a question of ultimate decision and not of initial jurisdiction. In our opinion, the present matter was one which the Collector was empowered to dispose of under the special Act and accordingly, apart from the question as to whether the District Judge is or is not a *persona designata* under the provisions of the proviso and whether or not the High Court can interfere with his order in any circumstances this Court is debarred from interfering in the present case by the terms of the main provisions of section 10.

Mr. Mukherjee contended in the second place that his client was not a party to the compromise and that neither he nor his lawyer was present before the Sub Divisional Officer on the date when the alleged joint petition of compromise was filed. This again is a matter for the decision of the Collector on the evidence and it may be, of the District Judge as well. We are unable to see how this matter at all bears on the question of the Collector's jurisdiction or how it helps Mr. Mukherjee in establishing the jurisdiction of this Court.

For the reasons above given, we hold that on the facts in the present case this Court has no jurisdiction to interfere with the order of the District Judge, or, by interfering with his order to interfere with the order of the Collector. The Rule must accordingly be discharged, but we make no order as to costs.

APPELLATE CIVIL

*Before Mr. Justice P. B. Chakravasthi and Mr.
Justice T. H. Ellis.*

PURNA CHANDRA GHOSE

v.

SM. KIRAN BALA GHOSE.*

Civil.

1943.

May, 5.

Indian Registration Act (XVI of 1908), section 77—Suit under—Filing of plaint within 30 days but with insufficient court-fee—Code of Civil Procedure (Act V of 1908) order VII rule 11 (c), section 148—"Is sought to be registered" in section 77 of Registration Act, interpretation of—Sections 72, 73, 75.

Where in a suit under section 77 of the Indian Registration Act, the plaint with insufficient court-fee was filed within 30 days:

Held, that Registration Act does not deal with Civil Procedure and section 148 and Order 7 rule 11 (c) of the Civil Procedure Code deal with insufficiently stamped documents not excluding the plaints.

The effect of section 77 read with the section to which it refers is to make the civil suit a kind of appeal against the decision of the registration authorities. The section does not merely give an abstract right of suit on the happening of certain events; it provides for a further stage of proceedings of which the previous course has been dealt with by the previous sections.

The cause of action for the suit arises on the refusal of the registration authorities to register a deed.

There is nothing in section 72 or 73 or 75 of the Registration Act from which it can be argued that the proceeding before the Registrar and so a suit under section 77 are proceedings independent of the proceedings before the Sub-Registrar so that there is no bar against seeking registration in a different registration office.

The office "in which the document is sought to be registered", as contemplated by section 77 is the office where the document was presented for registration. It is in that office that the document must be sought to be registered in the suit as well and the suit can be brought only in the Court within the jurisdiction of which such office is situated—if the document was presented in a wrong office, the suit must still ask for registration there, but in such a case it will be futile to bring a suit, since the Court cannot direct registration by an officer which has no jurisdiction.

Appeal by the Defendant.

*Appeal from Appellate Decree No. 93 of 1943, against the decree of Jogendra Nath Das Gupta, Esq., Subordinate Judge, 4th Court of Zillah Dacca, dated the 24th of August, 1942, affirming the decree of Krishnendra Sander Bhattacharjee Esq., Munsiff, 1st Court, Manickganj, dated the 20th of April, 1939.

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Suit for registration of deed under section 77 of the Registration Act.

The material facts will appear from the judgment.

Messrs. P. C. Pakrashi and A. C. Bhattacharjee for the Appellant.

Mr. J. K. Sen Gupta for the Respondent.

The following judgments were delivered :

May, 5.

Chakravartti, J. :—This appeal raises a question under the Indian Registration Act which does not seem to have been considered in any reported case.

The facts are simple and may be briefly summarised as follows. On the 8th of March, 1937, one Sarat Chandra Ghose the maternal uncle of the plaintiff, executed a deed of gift in her favour and thereby gave her a piece of land, apparently as a present on the occasion of her marriage. The land was situated within the jurisdiction of the Sub-Registrar at Barangail in the district of Dacca. Shortly after the execution of the deed Sarat died and the document could not be registered by him. On Sarat's death, the plaintiff made repeated requests to the defendant, who is a brother of Sarat and his heir, to get the deed registered but he refused to do so and thereupon the plaintiff presented the deed for registration before the "Special Sub-Registrar" of Dacca. That Officer by an order dated the 23rd April, 1938, refused registration on the ground that execution was not admitted and the document appeared to him to be of a suspicious character.

On the 23rd May, 1938, the plaintiff brought the present suit under section 77 of the Registration Act in the Court of the First Munsiff at Manikganj and by her plaint prayed that the document might be directed to be registered in the office of the Special Sub-Registrar of Dacca. The plaint, as originally filed, was insufficiently stamped and the balance of the requisite court-fees was not paid till some date between the 3rd and the 11th of June which was the period of a second extension of time granted for the purpose. The defendant resisted the suit on the merits, but raised no question as to the jurisdiction of the court. The learned Munsiff held against him and found the deed to be a genuine document, but in spite of the prayer in the plaint which sought registration at Dacca, directed the deed to be registered by the Sub-Registrar of Barangail, within whose jurisdiction the property was situated and who was himself within the jurisdiction of the

Munsiff. On appeal by the defendant, this discrepancy was removed. The learned Fourth Subordinate Judge of Dacca upheld the finding of the Munsiff, but directed the plaint to be amended in order to bring it into conformity with the order made for registration at Barangail. No opportunity was given to the defendant to file an additional written statement and his appeal was dismissed. He came up to this court with a second appeal S. A. No. 1743 of 1939, and obtained an order that the appeal should be re-heard after giving him an opportunity to file an additional written statement. On a re-hearing of the appeal, as directed, it was again dismissed by a successor in office of the Judge who had heard the appeal in the first instance. Thereupon, the present second appeal was preferred by the defendant.

At the re-hearing of the appeal on remand, the question of jurisdiction was raised. In his judgment, the learned Judge does not discuss it very fully, nor dispose of it very satisfactorily. But he has held in effect that the amendment was properly allowed and since the property is situated within the jurisdiction of the Sub-Registrar of Barangail, there is no reason why registration by that officer could not be directed and why the suit could not be brought in the court at Manikganj, although the deed might have been presented for registration before the special Sub-Registrar of Dacca.

Although the officer before whom the deed was presented for registration has been referred to in the case as 'the Special Sub-Registrar of Dacca', we have satisfied ourselves that he was in fact the District Registrar. We were informed that 'special Sub-Registrar' was a term which had come to be popularly applied to the District Registrar, because he has a special jurisdiction under section 30 of the Act to register any document which might have been registered by a Sub-Registrar subordinate to him. The order of the 23rd April, 1938, itself shows that the officer who passed it was the District Registrar.

Before us, two points were urged by Mr. Pakrashi who appeared on behalf of the appellants. He contended in the first place that since full court fees on the plaint were not paid till after 30 days had elapsed from the District Registrar's order, the suit was not brought within 30 days as required by section 77 of the Registration Act, accordingly, it was barred by limitation. The second contention was that under section 77, a suit could be brought only in the court within the jurisdiction of which the office where the document was sought to be registered was situated and since, in

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the present case, the document was sought to be registered in the office of the District Registrar at Dacca, no suit could be brought in the court of the First Munsif at Manikganj.

The first ground taken by Mr. Pakrashi is entirely misconceived. He argued that the Registration Act was a self-contained statute which provided for its own periods of limitation and those periods could not be enlarged by invoking either the Limitation Act or the Civil Procedure Code. There is clearly no question of enlarging any period of limitation in the present case. The plaint was filed within 30 days of the Registrar's order, although it was insufficiently stamped. Under Order 7 rule 11 (c) of the Civil Procedure Code the Court may, where the plaint is written upon paper insufficiently stamped, fix a time within which the requisite stamp paper should be supplied and the plaint can be rejected only if the plaintiff fails to supply the stamp paper within the time so fixed. Again section 149 of the Code expressly provides that the court may, at any stage allow a person to pay the balance of the court fees payable by him on any document, and upon such payment the document shall have the same force and effect as if such fee had been paid in the first instance. Neither provision makes any exception against plaints in suits under section 77 of the Registration Act. As regards the extreme contention that the Civil Procedure Code itself would not apply, it is enough to say that the Registration Act does not deal with civil procedure and Mr. Pakrashi was unable to say under what law or principle, application of the code to a civil suit in a Civil Court was to be excluded. There can be no question that on the facts of the present case, the suit must be taken to have been filed on the 3rd of May, 1938, when in fact it was, and the first contention of Mr. Pakrashi must accordingly be overruled.

The really substantial question in the case is that raised by the second contention of Mr. Pakrashi, but before dealing with it, reference may conveniently be made to the terms of section 77. That section by sub-section (1) provides as follows :

"Where the Registrar refused to order the document to be registered, under section 72 or section 76, any person claiming under such document, or his representative, assign or agent may within thirty days of the making of the order of refusal, institute in the civil court, within the local limits of whose original jurisdiction is situated the office in which the document is sought to be registered, a suit for a decree directing the document to be

registered in such office if it be duly presented for registration within thirty days after the passing of the decree,"

The contention is that the office where the document is unsuccessfully presented for registration is the office where it is "sought to be registered" and a suit can be brought only in the court within whose jurisdiction that office is situated asking for registration in that office. A person claiming under a document cannot actually seek registration in one office and then in his suit ask for registration in another, thus enabling himself to bring the suit in the court within whose jurisdiction the office of his later choice is situated. In aid of this argument it was contended that refusal of registration by a particular Registrar or Sub-Registrar was the cause of action for the suit contemplated by the section and accordingly the relief prayed for in the suit must have reference to that particular officer.

Mr. Sen Gupta who appeared for the respondent contended in the first place that the words used in the section were "is sought to be registered" and not "was sought". It was thus clear that the office contemplated by the section was the office in which the document was sought to be registered at the time the suit was brought, that is to say the office where registration was asked for by the plaintiff.

It was contended in the second place that the section did not require that such office must be the office where the document had been presented for registration. The first part of the section merely recited the events on the happening of which a right to bring a suit in a civil court would arise, but its effect was not to make refusal of registration by a particular officer the wrong for which a remedy was provided in a civil suit.

It was contended thirdly that whereas in the present case, the refusal was on the ground of denial of execution, the order allowing registration, whether passed by the Registrar under section 75(1) or by the civil court under section 77, merely established the right of the party concerned to have the document registered. Unlike an order passed under section 72, it did not correct the action of any particular officer and accordingly there was no reason why in such a case the plaintiff in the suit under section 77 should be held to the office which had refused him registration. This result was said to follow from sections 35 (3)(c), 71 (2), 73, 74, 75 and 76(b).

It will be seen that the whole question turns primarily upon the true meaning of the words "is sought to be registered", occurring

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in section 77. If they mean "is sought in the plaint" it is clear that no objection could be taken to the jurisdiction of the First Munsiff at Manikganj on the plaint as amended. But if the reference is to the original attempt made to obtain registration, failure in which is the occasion for bringing the suit, the plaintiff in a suit under section 77 is not entitled to change the registration office and thereby confer jurisdiction on another court. He must adhere to the office where he tried to obtain registration and failed, and bring his suit in the court within whose jurisdiction that office is situated, for that is the office where the document "is sought to be registered".

It is clear that the view contended for by the respondent is of importance only in cases where registration could legally be had in either of the two offices, unless it is said that even if a person presented his document in an office which had no jurisdiction, he can, in his suit, ask for registration in an office which has. It is also clear that if the view contended for by the appellant be correct, a suit will be worth while only in cases where the office in which the document was presented for registration was one where it could legally be registered under section 28, 29, or 30. If registration in the same office must be asked for in the suit, it will be useless to ask for it if the office be one where registration could not be had in law. With regard to cases coming under section 30, a further qualification must be made and a suit will be worth only if the Registrar received the document in the exercise of his discretion, but refused registration on the merits. Lastly, on the appellants' contention, even if a document might be registrable in two different offices, a party cannot, after presenting it in one of them ask in his suit for registration in the other.

With these practical implications of the two respective views in mind, we might now approach the task of interpreting section 77. But it will be useful to ascertain first the different kinds of case to which the section applies, for its true meaning must be one which applies to all cases covered by it.

The section gives a right of suit "where the Registrar refuses to order the document to be registered, under section 72 or section 76". Section 76(1) covers three cases: (a) that the Registrar refusing to register the document, when presented in the first instance to himself, (b) that of his refusing to direct registration under section 72 and that of his so refusing under section 75. Since 76(1) covers a case of refusal under section 72, it would have been sufficient if section 76 alone had been mentioned in

section 77 and the separate mention of section 72 is not very logical. The refusal under section 72 has reference to the case where a Sub-Registrar refuses registration on a ground other than denial of execution and thereupon an appeal is taken to the Registrar. The refusal under section 75 refers to the case where a Sub-Registrar refuses registration on the ground of denial of execution and thereupon an application is made to the Registrar. Section 77 makes no mention of section 75. The logical way of expressing the section would have been either to mention only section 76 which would cover all the three cases or to mention all the three sections 72, 75 and 76, the last applying to cases of original refusal by the Registrar. To such cases the language of section 77, viz., "refuses to order the document to be registered" is not, it is true, wholly appropriate, for while it would cover cases of denial of execution, where the Registrar directs or refuses to direct the document to be registered (See section 35 (1) proviso, section 74 and section 75). *Prima facie* it would not cover other cases where, apparently, the Registrar simply registers a document or refuses to register it. But although the accordance of section 77 with sections 72, 75 and 76 is not perfect it is reasonably clear that the section covers all cases of refusal by Registrar, whether on an appeal under section 72 or an application under section 73 or with respect to a document presented before himself.

In our opinion, the effect of section 77, read with the section to which it refers, is to make the civil suit a kind of appeal against the decision of the registration authorities. The Section does not merely give an abstract right of suit on the happening of certain events; it provides for a further stage of proceedings, of which the previous course has been dealt with by the previous sections. It does not say "where the registrar refuses to order a document to be registered", but says "where the Registrar refuses to order the document to be registered".

The language implies a reference to a particular document which has been the subject of proceedings under section 72 or 73 or 76 and the suit is provided as a remedy against the refusal of the registration authorities to register it. The refusal is the cause of action. From that it follows that the relief contemplated by the section is reversal of the order of refusal and the prayer contemplated by it is that the office which has refused to register the document be directed to register it. In other words, the office "in which the document is sought to be registered" and which, under the terms of the section must be directed to register it if

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the suit succeeds, can only be the office where the document was presented for registration.

We do not think the use of the present tense creates any difficulty or that its effect is to enable the plaintiff to choose at his will any competent office he likes. In our opinion, the scheme of the series of sections from section 72 to section 77 is that a person claiming under a document, seeks to have it registered in a particular registration office and having failed in his attempt before the registration authorities, carries the same attempt further by means of a civil suit which, of essence is a continuation of the same proceeding in another forum. There is but one seeking throughout and, accordingly, the section appropriately uses the present tense.

It does not seem to us to be correct to say, as the Respondent contended, that in cases coming under section 73 the proceeding before the Registrar is an independent and original proceeding having no reference to the order of the Sub-Registrar, but launched only "in order to establish the right to have the document registered." The point of the argument seems to be that if even before the Registrar, it is not necessary to seek registration by the particular Sub-Registrar who refuses to register the document, still less can it be necessary in a suit under section 77. Section 77, however, is not limited to cases coming under section 73 but covers all cases, and even with respect to cases under section 73 the assumption underlying the argument is not correct. It is true that the section speaks of establishing a right to registration, but the order passed on the application under section 75(1), the Registrar must "order the document to be registered". Under section 75(2), when such an order is passed and the document is duly presented for registration, "the registering officer shall obey the same." In our view, it is not possible to say that the order is an order at large, to be obeyed by any competent registering officer to whom the document may be presented for registration. It is noticeable that in cases coming under section 72 which comprise all cases except those of denial of execution, the appeal to the Registrar must be against the order of the Sub-Registrar, and if the Registrar directs the documents to be registered, "the Sub-Registrar shall obey the same". There can thus be no doubt that in cases coming under section 72 the proceeding before the Registrar is not an independent proceeding and the officer to whom the document must be presented if the appeal succeeds and who is directed to obey the Registrar's order, is the same Sub-Registrar who had refused registration. We can find no reason to think that with respect to the single type of

case which comes under section 73, the Act makes a distinction and no reason why it should have done so. It is true that in describing the officer who is to obey the Registrar's order in this class of cases, section 75(2) uses the general term "registering officer" but the obvious reason is that section 75(1) covers cases of original presentation before a Sub-Registrar as well as of such presentation before the Registrar himself (see section 74). Lastly, in the case of refusal by the Registrar to register a document presented to himself which also is covered by section 77, it is meaningless to say that the proceeding before the Registrar is an independent proceeding.

In our opinion there is nothing in section 72 or 73 or 75 from which it can be argued that the proceeding before the Registrar, and so a suit under section 77 are proceedings independent of the proceedings before the Sub-Registrar so that there is no bar against seeking registration in a different registration office.

Another argument was that section 71(2) showed that after a document, refused registration by a Sub-Registrar, had been directed to be registered, it could be registered by any registering officer. The argument is surprising. Section 71(2) merely says that "no registering officer" shall accept for registration a document on which a refusal of registration has been endorsed unless and until it is directed to be registered. It is impossible to see how from that provision it follows that after the document has been directed to be, registered any registering officer may register it. The general term "registering officer" on which much reliance was placed, has been used obviously because the bar affects both Registrars and Sub-Registrars.

The last contention was that if registration had to be sought in the same office, an impossible situation would arise where, as in the present case, the document was presented for registration in the first instance before a Registrar. The jurisdiction of the Registrar to register a document was, it was said, only discretionary and there could not possibly be a prayer for a direction that the document be registered by the Registrar. It is true that under section 30 of the Act, a Registrar may accept a document for registration only if he chooses to do so; but the argument overlooked that if the Registrar refused to accept the document at all, no question of bringing a suit could arise. There would be an occasion for bringing a suit only if the Registrar accepted the

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document in exercise of his discretion and thereafter refused registration on the merits. In such a case the Registrar having foregone his privilege of refusing to accept the document, there is no reason why he cannot be directed to register it if his view on the merits be found to be wrong.

We have said enough to show that none of the documents of the respondent can dislodge what appears to us to be the true view of section 77. That view received additional support from sub-section (2) of the section. The sub-section provides that the provisions contained in sub-sections (2) and (3) of section 75 shall apply *mutatis mutandis* to documents presented for registration in accordance with a decree passed under section 77. If section 75(2) implies, as we have held it to do, that the document must be presented to the same registering officer who had refused registration and that it is he who is directed to obey the order of the Registrar, it follows that in the case of a decree under section 77 as well, the document must be presented to the same registering officer and it is he who is directed to obey the decree. It follows further that since a suit under section 77 must be for a decree "directing the document to be registered" in the office "in which the document is sought to be registered" it is intended that such office must be the office where the document was first presented for registration. Section 75(3) emphasises further the correctness of this view. There it is provided that the registration shall take effect as if the document had been registered when it was first duly presented for registration. If the respondent's view be correct, it would be possible for a person to present his document to an officer having no jurisdiction and, on being necessarily refused registration, to bring a suit, asking for registration in another and a competent office and to obtain the necessary direction. How could section 75(3), which applies *mutatis mutandis* to all documents presented for registration under a decree in a suit under section 77, apply to all in such a case? The document had not previously been duly presented for registration in any office and accordingly the sub-section cannot apply and the registration, which must almost certainly be time-barred if the benefit of the sub-section cannot be obtained, cannot take effect. It is no answer to say, as the respondent did say, that in such a case the Court will not decree the suit. His own argument was that the suit was an independent proceeding, which had no reference to proceedings before the registration authorities and in which the only question was the registrability of the document. If so, there is no reason

why the Court should dismiss the suit simply because the document had been presented to a wrong office.

In our opinion, the conclusion is inescapable that the office in which the document is sought to be registered, as contemplated by section 77, is the office where the document was presented for registration. It is in that office that the document must be sought to be registered in the suit as well and the suit can be brought only in the Court within the jurisdiction of which such office is situated. If the document was presented in a wrong office, the suit must still ask for registration there, but in such a case it will be futile to bring a suit, since the Court cannot direct registration by an officer which has no jurisdiction.

For the reasons given above, it must be held that the plaintiff had no right to ask for registration by the Sub-Registrar Barangali, as she did on the plaint as amended and on that basis to bring and maintain her suit in the Court of the First Munsiff at Manikganj. The appeal is accordingly allowed, the judgment and decree of both the Courts are set aside and it is directed that the plaint be returned by the trial Court to the plaintiff for presentation to the proper Court.

KILLS, J. :—I agree.

A. T. M.

Appeal allowed.

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Before Mr. Justice S. R. Das.

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December, 17.

Indian Lunacy Act (Act IV of 1912), Part III, chapters IV and V—"Judicial powers over persons and estate of lunatic"—Interim order for custody or management of estate of a person before adjudging him a lunatic, if can be passed—High Court Original Side Rules (Rem'ry) Chapter XXX—Provisions re: lunacy, if exhaustive and take away inherent power of High Court—Proceedings in lunacy, if civil proceedings—Code of Civil Procedure (Act V of 1908), section 141, Orders 39, 40—Interlocutory orders in lunacy, if can be passed under—High Court as successor to Supreme Court, if has all powers and jurisdiction of courts of Chancery in matters of welfare of infants and lunatics—High Court, if has inherent powers on matters on which the Lunacy Act is silent.

Though it is true that the sections in chapters IV and V of Part III of Indian Lunacy Act dealing with "judicial powers over persons and estate of lunatic" do not in terms contemplate or sanction the making of any interim order for the custody or the management of the estate of a person before he is adjudged to be a lunatic, nor is there any provision for the same in Chapter XXX of the High Court Original Side Rules, yet it does not follow that it was intended that the provisions should be exhaustive in the sense that these would take away all inherent powers of a Court of law.

Rajendra Kumar Gupta v. Shailendra Kumar Gupta (1) followed.

Sarej Basini Debi v. Mohendra Nath Bhajuri (2) dissented from.

There can be no doubt that proceedings in lunacy are civil proceedings in a court of civil jurisdiction.

Meni Lal v. Nepal Chandra (3) followed.

Section 141 of the Code of Civil Procedure will apply in proceedings in lunacy and the powers for making interlocutory orders under Order 39 and Order 40 must necessarily become available to the Court.

Rajendra Kumar Gupta v. Shailendra Kumar Gupta (1) relied on.

The High Court of Calcutta as the successor to the Supreme Court (under Charter of 1774 and Letters Patent of 1862 and 1865) has all the powers, authority and jurisdiction of the Courts of Chancery in all matters concerning

*Application in Suit No. 818 of 1941 (Partition).

(1) (1927) I. L. R. 54 Calc. 836.

(2) (1917) 22 C. W. N. 547.

(3) (1937) I. L. R. [1938] 1 Calc. 180; 42 C. W. N. 92.

the welfare and the care of infants and lunatics and English Courts frequently make interim orders in lunacy proceedings before a person is adjudged lunatic.

Ex parte Whitfield (1); *In re : Fountain* (2); *In re : Sanger Hunt* (3) and *Re : A-G* (4) referred to.

The provisions of Indian Lunacy Act in so far as they are expressly contrary to or inconsistent with the powers of the High Court under its Letters Patent must prevail but the High Court has inherent powers to act on matters on which the Act is silent.

Application by the Purchaser.

Suit for partition.

The material facts will appear from the judgment.

Messrs. P. B. Mukherjee, S. N. Banerjee for the Receiver (*B. P. Chunder*).

Mr. B. K. Ghose for Defendants Nos. 3 and 4.

The following judgment was delivered :

DAS, J. :—The suit in which this application has been made is a partition suit filed by one Kalachand Chunder, an attorney of this Court, for partition of premises No. 7, Mutali Dhar Sen Lane.

On December 22, 1941, a preliminary decree was passed in this suit declaring the shares of the parties in the property and appointing Mr. T. Chatterjee as the commissioner of partition and Mr. Salehjee as the Receiver. By this decree it was provided, inter alia, that in the event of the said commissioner of partition finding that the said premises could not be conveniently and reasonably partitioned by metes and bounds, the commissioner of partition should sell the same by private treaty or by public auction to the best purchaser provided the commissioner of partition considered that a sufficient bid had been offered. The commissioner of partition was directed to fix a reserve price and was given liberty to issue advertisements for sale. Liberty was also given to the parties to bid at the sale.

On March 3, 1944, Mr. T. Chatterjee and Mr. Salehjee were by an order of Court discharged and Mr. A. C. Gupta was appointed the receiver and commissioner of partition on the same remuneration and with the same powers.

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(1) [1742] 2 Atkin 315; 26 E. R. 592.

(2) [1888] L. R. 37 Ch. D. 609 C. A.

(3) [1900] L. R. 2 Ch. 54.

(4) [1909] 53 Sol. J. 615.

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Dost Mahomed, one of the defendants, having died intestate, an order was made on August 16, 1944, recording the death of Dost Mahomed and amending the register of the suit by describing the defencants Fazle Karim, Nazir Mahomed and Aysha Bibee (being the brothers and sister of Dost Mahomed) in their individual capacities as well as in their capacities as heirs and legal representatives of the said deceased and re-adjusting the shares of the defendants consequent upon the death of Dost Mahomed.

On April 25, 1945, a petition was filed before me by the wife and children of Kalachand Chunder praying for an inquisition as to the mental state of Kalachand Chunder. The petition was instituted in the matter of clause 17 of the Letters Patent and Act IV of 1912. It was alleged that Kalachand Chunder had become a person of unsound mind and had, while in that state of mind, left his dwelling house and could not be traced. This petition which was accompanied by a medical certificate was verified by the affidavit of the wife of Kalachand Chunder and was also supported by a separate affidavit of his father, Mr. B. P. Chunder, a senior attorney of this Court. On a consideration of the facts appearing on the record before me, I made an order on that date directing that an enquiry be held before the Court on June 25, 1945, (1) as to whether the said Kalachand Chunder was a person of unsound mind and incapable of managing himself and his affairs, (2) as to the time during which he had been of unsound mind, (3) as to the nature of the property belonging to him and (4) as to such other points as the Court might think fit. I further directed a copy of that order to be served on Mr. B. P. Chunder and Mr. Sambhu Nath Chunder being the father and brother respectively of Kalachand Chunder and on the said Kalachand Chunder in the several modes therein mentioned. In view of the urgency arising out of the facts that several suits to which Kalachand Chunder was a party were pending, that the rents of several houses belonging to Kalachand Chunder had to be collected from the tenants and that Municipal rates and taxes had to be paid, I did by the same order appoint Mr. B. P. Chunder until the enquiry was held or until further orders, the interim receiver and manager to look after the affairs of Kalachand Chunder with various powers for the management, realisation and preservation of his estate as therein specified. Mr. B. P. Chunder was empowered amongst other things, to continue proceedings already instituted by the said Kalachand Chunder,

in his own name in the Small Causes Court and in this Court and bring them to a termination, to join in the sale of the premises No. 7, Murlidhar Sen Lane and to do all acts necessary for the proper management of the estate including the execution of documents on behalf of Kalachand Chunder. It was further provided by that order that receipt of Mr. B. P. Chunder as such receiver should be a sufficient discharge for all such sums of money or property as should be paid or delivered to him.

The enquiry, however, could not be proceeded with on the appointed day and had to be adjourned in view of the difficulty, brought about by the disappearance of Kalachand Chunder, in producing him before the Court and in procuring any evidence of his state of mind at or about the time of the enquiry, and eventually on September 3, 1945, an order was made giving certain additional powers to Mr. B. P. Chunder as such receiver and manager including the power to spend a sum not exceeding Rs. 300 per month towards the maintenance of the family of the said Kalachand Chunder and to invest the moneys representing the accumulation of rents as also the sale proceeds of half share of 7, Murlidhar Sen Lane in $3\frac{1}{2}$ per cent. Government promissory notes and adjourning the enquiry *sine die*.

Mr. A. C. Gupta, the commissioner of partition appointed in this suit, being of opinion that the premises No. 7, Murlidhar Sen Lane could not be conveniently partitioned by metes and bounds, proceeded with the sale of the premises as he was authorised to do by and under the decree passed in this suit. The sale actually took place on July 13 1946. It was held subject to certain conditions of sale, a copy of which is annexed to the present petition and marked 'A'. At the sale the present applicant was declared the highest bidder and purchaser of the said premises at and for Rs. 76,000. In terms of the conditions of sale the purchaser paid to the commissioner of partition 25 per cent. of the purchase money.

The abstract of title having been delivered to the purchaser, the latter, on or about July 24, 1946, by and through his attorney caused certain requisition on title to be made which were answered by the plaintiff's attorney. On August 6, 1946, certain further requisitions arising out of the answers to the earlier requisitions were delivered and answered. All these requisitions and answers are annexed to the petition and collectively marked "B". There is no suggestion that the requisitions on title were not delivered

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within time. Item No. 3 of the first set of requisitions and Items Nos. 1 and 2 of the further requisitions raised the question as to how and by whom was interest of Kalachand Chunder to be legally conveyed to the purchaser. Item No. 10 of the first set of requisitions and Item No. 3 of the further requisitions related to the absence of a certain original conveyance dated July 27, 1921, which solely related to the premises in question. On August 8, 1946, the purchaser took out the present summons praying for leave to pay the balance of the purchase money, for delivery of the said original conveyance dated July 27, 1921, for suitable directions in default of delivery of the same, for necessary action, directions for the conveyance of the share of Kalachand Chunder and as to the person who should sign and execute the conveyance on his behalf, if necessary, for the setting aside of the sale and return of the money already deposited by the purchaser. The summons was made returnable on August 9, 1946. On that date an order was made giving leave to the purchasers to pay the balance of the purchase money to the commissioner and the rest of the application was adjourned. The purchaser paid the balance of the purchase money to the commissioner of partition and there is no doubt that he is a bonafide purchaser and has made this application in perfect good faith. Indeed Mr. P. B. Mukherjee appearing for the purchaser has made it clear that his client is anxious to complete purchase, provided that a reasonably good and marketable title can be conveyed to him.

The adjourned application came up for hearing before me when learned counsel appeared for all parties other than Fatehadin and Aysha Bibee, two of the defendants, served by registered post and the registered letters had come back with the remark "addressee not known". I had doubts whether this was a proper service. Further the appearance of Fatehadin who was alleged to have the missing title deed was considered necessary. Consequently I directed fresh service by advertisement and also by registered post and adjourned the application. I understand that fresh notices have again been sent by registered post but advertisements have not yet been issued. The matter was mentioned to me yesterday and I was told that Fatehadin had since then come down to Calcutta and would produce the original conveyance. In these circumstances I did not consider it necessary that the advertisements should be issued and I directed the matter to be listed for judgment. The order I propose to make will not adversely affect Aysha Bibee.

Mr. Mukherjee's first contention which was based on item No. 3 of the requisitions and items Nos. 1 and 2 of the further requisitions was that in the events that had happened there could be no valid and effective transfer of the half share of Kalachand Chunder in the premises in question, for there was nobody who could convey it for him. His argument was as follows: Kalachand Chunder left his dwelling-house some time in September, 1944, and had not been heard of since. Sufficient time had not elapsed so as to give rise to any presumption of death. Therefore we must proceed on the basis that he is alive. It is alleged that Kalachand Chunder was, at the time he left his dwelling-house, a person incapable, by reason of unsoundness of mind, of managing himself and his affairs. He had not been found to be a lunatic on inquisition under the Lunacy Act and therefore, no manager of his property could have been validly and properly appointed. Mr. Mukherjee took me through the relevant sections of part III of the Indian Lunacy Act and contended that the scheme and provisions of those sections clearly contemplated the appointment of a guardian of the person or manager of the property after a finding as to lunacy was affirmatively arrived at as a result of the enquiry by the court. His contention was that the Act did not contemplate or sanction the appointment of any interim guardian or manager. Therefore, concluded Mr. Mukherjee, the order made on April 25, 1945, in the lunacy proceedings appointing Mr. B. P. Chunder as the receiver and manager of the estate of Kalachand Chunder until the conclusion of the enquiry was wholly without jurisdiction and Mr. B. P. Chunder did not lawfully represent the estate of Kalachand Chunder and could not transfer title to any part of it. Mr. Mukherjee relied on the case of *Saroj Basini Dobi v. Mohendra Nath Bhaduri* (1); in that case, which was an appeal from the decision of the District Judge, Rankin, C. J., examined the relevant sections of the Indian Lunacy Act and set out in detail the procedure contemplated by the Act. At page 847 the learned Chief Justice made the following observations:

"Under the jurisdiction with which we are concerned, it may be worth while to notice that orders for the custody of lunatics and for the management of their estates do not come into question at all, until there has been a finding of lunacy as a result of an inquisition. There is no question of interim orders on such

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matters pending the determination as to the person's state of mind "

There can be no doubt that the above observations support Mr. Mukherjee's argument, but with the utmost respect to Rankin, C. J., I am unable to accept his views.

The sections grouped under the heading "Judicial powers over person and estate of lunatic" in Chapters IV and V of part III of the Indian Lunacy Act appear by their terms to confer on the court certain powers which can only be exercised in respect of the person or property of a lunatic so found on inquisition. I respectfully agree with the learned Chief Justice that those sections do not in terms contemplate or sanction the making of any interim order for the custody or the management of the estate of a person before he is adjudged to be a lunatic. It is also clear that there is no express provision in the Act authorising the court to make any interim order of the kind I have mentioned. Nor is there anything in the rules framed by this Court and embodied in Chapter XXX of the Original Side Rules. But does it follow that the Act is intended to be exhaustive in the sense that it takes away all inherent powers of a court of law. It is easy to visualise cases of such urgency as may imperatively necessitate the making of such interim orders by the court before which proceedings are pending and every court must of necessity have such powers. To deny such inherent power may result in irreparable injury to the very person who and whose estate is before the court and whose interest the Court is expected to protect. There can be no doubt that proceedings in lunacy are civil proceedings in a court of civil jurisdiction [See *Moni Lal v. Nepal Chandra* (1)]. If that be so, then section 141 of the Code of Civil Procedure will apply and the powers for making interlocutory orders under Order 39 and Order 40 must necessarily become available to the court. This section I apprehend, will also save the inherent powers of the Court. I find support for my views from the observations of Costello, A. C. J., in the case of *Rajendra Kumar Gupta v. Shailendra Kumar Gupta* (2). In that case after quoting the above passage from the judgment of Rankin, C. J., in *Saroj Basini's* case (3) the learned Acting Chief Justice observed as follows at pp. 183-184 :

(1) (1937) I. L. R. [1938] 1 Calo. 180 ; 42 C. W. N. 92.

(2) (1927) I. L. R. 54 Calo. 836.

(3) (1917) 22 C. W. N. 547.

I am not at all sure that Sir George Rankin intended to say more than this, that there should not be an interim order for the custody of lunatics or for the actual management of their estates pending the result of the inquisition, emphasis being placed on the word "management". To put the matter in another way, it would not be proper either to appoint a custodian or a manager before there had been a definite finding on the inquisition that the alleged lunatic was in fact a lunatic. If, however, the learned Chief Justice intended to say that in no circumstances can any kind of interim order touching the property of an alleged lunatic be made, then, with all possible respect to him, I can only say that I am unable to agree with his opinion, having regard to the authority in a contrary sense furnished by certain decisions of the Courts in England.

It has been suggested in course of the argument before us that the observations of the learned Chief Justice as regards interim orders were after all no more than *obiter dicta*, in that in the case then before the Court there had been no question of making an interim order at all. Whether that is so or not, it seems to me that it would be most unfortunate, undesirable and certainly not in accordance with the practice in England if we were to hold that a Court in this country has in no circumstances power to appoint an interim receiver for the protection of the property of a person who is alleged to be a lunatic. In my view the provisions of the Indian Lunacy Act of 1912 and the amending Acts which compendiously may be called the Indian Lunacy Act, 1912-1926, are not absolutely exhaustive. Clearly the present matter is not one which in any sense falls within the scope of either section 71 or section 71 read with section 56. If there is any section in the Indian Lunacy Act which deals with the point we are considering or any question closely akin to it, it must, in my opinion, be section 67 and not section 71. However, we may take it that this is a matter which lies outside the actual provisions of the statute, and in those circumstances it seems to me that the Courts in this country are entitled to exercise that kind of inherent jurisdiction which originally was exercised by the Courts of Chancery in England in all matters concerning the welfare and the care of infants and lunatics.

I do not think it serves any useful purpose to try and explain or distinguish this case from that before Rankin, C. J. It is better to openly express my disagreement which I respectfully do.

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Even if there be any doubt as to the powers of the District Courts in the matter of making interim orders in pending lunacy proceedings, I entertain no doubt whatever as to the powers of this High Court to do so. This High Court has lunacy jurisdiction under clause 17 of the Letters Patent of 1865. That clause confers on this Court "the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Bengal Division of the Presidency of Fort William as that which was vested in the said High Court immediately before the publication of these presents." This takes us back to the Letters Patent of 1862 which was in force immediately before the publication of the Letters Patent of 1865. Clause 16 of the Letters Patent of 1862 ordained that the High Court should have the like jurisdiction as to infants and lunatics as was then vested in the Supreme Court. This provision takes us further back to the Charter of 1774 establishing the Supreme Court at Fort William in Bengal. Under clause 4 the Chief Justice and Judges of the Supreme Court were given the same powers as the Judges of Kings Bench of England had and under clause 18 the Supreme Court was constituted as a Court of Equity with "full power and authority to administer justice in a summary manner, as nearly as may, according to the rules and proceedings of our High Court of Chancery in Great Britain." Clause 25 of that Charter authorised and empowered the Supreme Court "to appoint, guardians and keepers for infants, and their estates according to the order and course observed in that part of Great Britain called England and also guardians and keepers of the persons and estates of natural fools or of such as are, or shall be deprived of their understanding or reason by the Act of God, so as to be unable to govern themselves and their estates" and also authorised and empowered that Court "to enquire, hear and determine by inspection of the person, or by such other ways and means by which the truth may best be discovered and known." From what I have stated it follows that this High Court as the successor to the Supreme Court has all the powers, authority and jurisdiction of English Court referred to above. There can be no doubt that the English Court frequently make interim orders in lunacy proceedings before a person is actually found to be a lunatic on inquisition. Reference may be made to *Ex parte Whitfield* (1); *In re : Fountain* (2);

(1) [1742] 2 A. T. K. 315; 26 E. R. 592.

(2) [1888] L. R. 37 Ch. D. 609 C. A.

Seager Hunt (1) and *Re A. G.* (2). The position is summarised in Theobald's Law relating to Lunacy at page 401 in the following words :

In an urgent case an interim receiver may be appointed for the protection of a lunatic's property, upon sufficient medical evidence, and without service or security. The order provides for giving security as soon as possible and for notice of the order to the lunatic with liberty to him to apply to discharge it on short notice.

It is not necessary to refer to rule 83 of 1892 for power to appoint an interim receiver; it is part of the inherent jurisdiction to protect the property of lunatics. The powers conferred by the Act of 1908 are also sufficient to meet the case. Interim orders have frequently been made; see, for instance, *Seager Hunt* (1).

These interim orders have also been recognised by the Lords Justices. It was found that an elderly lady of weak mind was living in her own house in a state of neglect, and it was necessary, at once to have her properly cared for. The matter being urgent, an interim receiver was appointed by the Master. W., January 12, 1922.

When the receiver went to the house to carry out the order he was refused admission by a person who had been allowed to occupy the basement. Application was thereupon made to the Lords Justices for an order to commit this person, and after discussion in Court an order of committal was made, thus recognising in the clearest way the validity of the interim order. W., Sterndale, M. R., Younger, L. J., 1st February, 1922.

It has been argued that the provisions of the Letters Patent are by clause 44 thereof made subject to the legislative powers of the Indian Legislature. It is contended that the Indian Legislature has, by the Lunacy Act, altered the law. Reference is made to section 2 of the Lunacy Act which provides that nothing contained in Part II will affect the powers of the High Court. It is urged that this section clearly shows that the other provisions contained on other parts of the Act affect the powers of the High Court. Part II provides for the reception, care and treatment of lunatics and gives certain powers to certain persons or tribunal. It was, therefore, necessary to make it clear that those provisions did not affect the powers of the High Court over any person found

(1) [1900] L. R. 2 Ch. 54.

(2) [1909] 53 Sol. J. 615.

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on inquisition to be a lunatic or over the property of such lunatic. Part III, Ch. IV, however, deals with lunacy proceedings in the High Court. In so far as express provisions have been made in that part they are certainly intended to be binding on the High Court and ex-hypothesi there could be no occasion for preserving the powers of the High Court as against those provisions. But it is quite a different thing to say that even in matters on which the Act is silent the powers of the High Court must be deemed to have been taken away. I readily agree that the provisions of the Lunacy Act, in so far as they are expressly contrary to or inconsistent with the powers of the High Court under its Letters Patent, must prevail but I am not prepared to countenance the contention that the Legislature has, by a side wind, taken away the inherent powers of this Court, which, I consider, are essentially necessary in the ends of Justice. While sitting as a Judge of this Court I for one shall not, in the absence of unambiguous provision enacted by a competent legislative authority, readily give up ancient and time-honoured powers, authority and jurisdiction which this Court has inherited from the Supreme Court. In my opinion, for the reasons mentioned above, the order of September 3, 1945, was a valid order and Mr. B. P. Chunder as the receiver and manager of the estate of Kalachand Chunder can legally convey the latter's half share and pass a good title to the purchaser. I, however, agree with Mr. Mukherjee that the records of this suit should be suitably amended either by substituting Mr. B. P. Chunder as such receiver and manager in the place of Kalachand Chunder or by describing Kalachand Chunder as a person who, though not adjudged to be a lunatic, is by reason of unsoundness of mind or mental infirmity incapable of protecting his interest and suing by a next friend appointed under order 32, rule 15, Civil Procedure Code. Even for the purposes of this application such amendment is necessary. Mr. Banerjee agrees that the register of this suit should be amended in the latter way. Relying on the materials on which the order of April 25, 1945, was made and the materials on which an order under order 32, rule 15 was made by me in another proceeding on September 3, 1945, which related to the mental state of Kalachand Chunder and all of which are now field of record of this Court I find that the plaintiff Kalachand Chunder is by reason of unsoundness of mind or mental infirmity incapable of protecting his interest and acting under order 32, rule 15, Civil Procedure Code. I appoint Mr. B. P. Chunder as the next friend of Kalachand Chunder to continue this

suit to its termination and execute and register the conveyance on behalf of Kalachand Chunder. Let the register of this suit be amended accordingly and let the sale be now completed.

Mr. P. B. Mukherjee's next contention arising out of Item No. 10 of the requisitions and Item No. 3 of the further requisitions was that the original conveyance dated July 27, 1931, from Indra Kumar Sen to Makamdin and another was not forthcoming and in the absence of that document the title cannot be regarded as clear or free from infirmity. I am free to confess that this objection appeared to me of substance. The point, however, has become academic by reason of the fact that Fatehdin has now appeared and produced the document. I need not, therefore, discuss this question any further. I only direct that this original conveyance be delivered to the purchaser at the time of the completion of the sale. Fatehdin through his counsel has waived service.

I ought here to mention that no objection has been taken by Mr. Banerjee or Mr. Ghose as to the form or maintainability of this application on the ground that the rules regulating a sale by the Registrar are not applicable to this sale which was held by the commissioner of partition or otherwise. This was a sale in a partition suit and presumably section 7 of the Partition Act attracts the procedure usually taken for setting aside a sale by the Registrar.

Applicant's costs of this application will be paid out of the consideration money by the commissioner of partition. Costs of the other parties will be as in a partition suit. Certified for Counsel.

The operation of this order will be stayed for a week after the order is completed and filed.

S. C.

*Application allowed:
Order appointing Receiver confirmed.*

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CRIMINAL REFERENCE.

*Before Mr. Justice T. J. Y. Roxburgh and Mr. Justice
P. B. Chakravarti.*

Criminal.

1947.

December, 12.

DR. ROBIUL HOSSAIN-MOLLA

v.

K. K. RAM AND OTHERS.*

Reference—Code of Criminal Procedure (Act V of 1898), chapter 14, sections 202, 203—Procedure to be followed by Magistrate, when complaint is filed before him.

R made a complaint to the Magistrate who after examining him on oath passed the following order: "To O/C Matlaburu P. S. for enquiry and if necessary to start a case treating the petition as F. I. R." On reference:

Held, that there was some slight confusion in the order given; the Magistrate could either (1) treat it not as complaint but send it to police to treat it as First Information Report and act under chapter 14 of the Code, or (2) examine the complaint and then direct an enquiry under section 202 of the Code by the C. C. who would then proceed with the investigation; in the former case (1), if the officer thinks that there is nothing in the information, the matter would come to the Magistrate as final report or else as a charge sheet if the officer consider that a case had been made out; and in the latter case (2), the report would come before the Magistrate as a report under section 202 of the Criminal Procedure Code, to be dealt with, under section 203 and other relevant provisions of the Code.

Reference by the 3rd Additional Sessions Judge of 24-Parganas.

Complaint under section 200 of the Criminal Procedure Code.

The material facts appear from the judgment.

Messrs. S. S. Mukherjee and Ajit Kumar Dutt for Accused Nos. 1, 3, 9, 10, 12, 13, 14, 15, 21, 25, 27, 28 and 29.

No one for the Complainant.

No one for the Crown.

The following judgment was delivered:

This is a Reference by the 3rd Additional Sessions Judge of 24-Parganas. A complaint was made to the Sub-Divisional Magistrate of Alipore by one Rabiul Hossain Molla against a number of Hindu accused. The Sub-Divisional Magistrate

December, 12.

* Criminal Reference No. 132 of 1947 by the 3rd Additional Sessions Judge of 24-Parganas, disagreeing with the order passed by the Sub-Divisional Magistrate of Alipore.

examined the complainant on oath and then passed the following order.

"To O/C Matiaburuj P. S. for enquiry and if necessary to start a case treating the petition as F. I. R."

The learned Sessions Judge objects to the order as it confuses two different procedures. What the Magistrate could have done was either (1) on getting the complaint not to treat it as a complaint but to send it to the Thana for the Police to treat it as a First Information Report and act accordingly under Chapter 14 of the Criminal Procedure Code. Alternatively (2) he could have examined the complainant as in fact he did so, and then direct an enquiry under section 202 of the Criminal Procedure Code by a Police Officer, namely the Officer-in-charge of Matiaburuj Thana. The officer would then have proceeded to have exercised all powers conferred by the Code on an officer-in-charge of the Thana and have made an investigation accordingly. In the former case (1) the matter would have come before the Magistrate either as a final report, if the investigating officer thought that there was nothing in the information or else as a charge sheet if he considered that a case had been made out. In the latter case (2) the report would have come before the Magistrate as a report under section 202 of the Criminal Procedure Code and he would have dealt with it under section 203 of the Code. If the report was one recommending no action, he might have dismissed the complaint. If the report had been one recommending that a case had been made out supplying the names of witnesses and the materials ordinarily supplied in a charge sheet he could have issued process. There is practically no substance in the matter referred. There is some slight confusion in the order as actually given. We therefore amend the order to run as follows :—

"To O/C. Matiaburuj for enquiry and report."

The order of the Additional Sessions Judge staying proceedings may have had a most unfortunate effect for it has stayed the investigation. The order is of course set aside.

The Reference is disposed of accordingly.

S. C.

Order of the Magistrate amended.

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Dr Robul
Hossain Molla

K. K. Ram.

CIVIL REVISION.

Before Mr. Justice A. G. R. Henderson.

CHITTARANJAN GUHA AND ANOTHER

CIVIL

1945

August, 22, 27.

PARUL RANI NANDI.*

Jurisdiction—Indian Contract Act (IX of 1872), section 28—Agreement in restraint of legal proceedings, if valid.

Where in a suit for damage in connection with a contract for supply of shoes brought in the Munsiff's Court at Dacca which has ordinarily to hear such suit, it was contended by the defendant that by a clause in the contract that "any legal action resulting from this contract will be taken in the Courts of Calcutta," such jurisdiction has been taken away:

Held, that the Munsiff of Dacca has jurisdiction to hear the case. The Court is inclined to the view that the agreement is void as it is within the mischief of section 28 of the Contract Act.

Achutlal Kenculal Mehta & Co v. Vijayam & Co. (1) not followed.

Kidri Prasad v. K. R. Khosala (2) referred to.

Ramrichal Chingmal v. Veehananda Mills (3) followed.

Dhanmal Marwari v. Messrs. Jankidas Baijnath (4) (*per Latifur Rahman, J.*) dissented from.

Application for Revision by the Defendant.

Mr. Hemendra Kumar Das for the Petitioners.

Mr. Surajit Chandra Lahiri for the Opposite Party.

C. A. V.

The following judgment was delivered:

August, 27.

This is a Rule obtained by the defendants calling upon the plaintiff to show cause why the plaint should not be returned for presentation in the proper Court. The suit is to recover damages in connection with a contract for the supply of shoes. Both the Munsiff at Dacca and the Presidency Small Causes Court have

* Civil Revision Case No. 1458 of 1945, against the order of A. R. Choudhury Esq., Munsiff, 2nd Court, Dacca, dated the 26th June, 1945.

(1) (1925) A. L. R. Mad. 1145.

(2) (1923) A. L. R. Lahore 425.

(3) (1944) 49 C. W. N. 58.

(4) (1944) 49 C. W. N. 123.

jurisdiction to entertain the suit. The contention of the petitioners is that the jurisdiction of the Munsiff at Dacca has been taken away by a clause in the contract which is in the following terms: "Any legal action resulting from this contract will be taken in the Courts of Calcutta."

There was a dispute as to the exact meaning of this clause. It was suggested by the plaintiff that the intention merely was to confer jurisdiction on the Calcutta Courts. The learned Munsiff was obviously correct in his interpretation. The jurisdiction is already in the Calcutta Courts and the only possible meaning is that the plaintiff should be prohibited from instituting a suit in any other Court.

The question whether such an agreement can be enforced has led to a divergence of judicial opinion. It really depends upon the meaning to be attached to the word "absolutely" in section 28 of the Indian Contract Act. If that word were not there, the petitioners would have no case. The same result will follow, if it is to be given the narrower of the two possible interpretations.

The opposite points of view are exemplified in the case of *Achritlal Kasavlal Mehta & Co. v. Vijayam & Co.* (1), which is in favour of the petitioners and in the case of *Kidri Prasad v. K. R. Khosla* (2), which is in favour of the opposite party.

The question has recently been considered in two decisions of this Court. In the case of *Ramniklal Chhaganlal v. Vivekananda Mills* (3), Gentle, J. held that, although the agreement was not void, it could not have the effect of taking the jurisdiction away from a Court possessing it under the provisions of the law. The other decision is in the case of *Dhanmal Marwari v. Messrs. Jankidas Baijnath* (4). The actual point was whether jurisdiction could be conferred by an agreement. On the present point Biswas, J., without definitely deciding it, was inclined to the view that such an agreement is not void. Latifur Rahman, J. was definitely of that opinion.

I should myself feel inclined to say that the effect of the agreement is to prevent the plaintiff absolutely from filing a suit in Dacca, which he has a right to do, and it is, therefore, within the mischief of section 28 of the Contract Act. But I am definitely of opinion that, even if the agreement was not void, it is putting

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Parul Rani Nandi,

(1) (1925) A. I. R. Mad. 1125.

(2) (1923) A. I. R. Lahore 425.

(3) (1944) 49 C. W. N. 58.

(4) (1944) 49 C. W. N. 123.

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the matter too high to say, that it has taken away the jurisdiction from the Court at Dacca. No doubt it is a matter of great inconvenience for a firm in the position of the petitioners to send its books and servants to various Courts all over the provinces. The fact that the plaintiff willingly made this agreement might certainly afford a good ground for transfer. That is quite another thing from saying that the Munsiff at Dacca has no jurisdiction to try the suit.

The Rule must accordingly be discharged.

The costs of the Rule will be costs in the suit,—hearing-fee one gold mohur.

B. R. C. ; A. T. M.

Rule discharged.

APPELLATE CIVIL.

Before Mr. Justice B. K. Mukherjee and Mr. Justice W. Mac. Sharpe.

HARIS CHANDRA CHOWDHURY

v.

DINES CHANDRA CHOWDHURY AND OTHERS.*

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February, 4, 5,
March, 1.

Limitation—Civil Procedure Code (Act V of 1908), section 47—Limitation Act, Schedule I, Article 182(2)—Time, if runs from the date when the appeal against order rejecting an application to set aside an ex parte decree was passed—Estoppel—Objection to execution—Service of notice under order 21 rule 22 of the Code of Civil Procedure (Act V of 1908).

An appeal from an order rejecting an application to set aside an ex parte decree under order 9 rule 13 Civil Procedure Code does not extend the period of limitation for execution of the decree under article 182(2) of the Limitation Act.

Fakir Chand Mandal v. Daiba Charan (1); Profulla Kumar Basu v. Sorejbala Basu (2); Baikanta Nath Mishra v. Angkore Nath Bose (3) and Christiansa Seng Lo v. Benarasi Prasad (4) followed.

* Appeal from Original Order No. 152 of 1944, against the order of M. C. Banerjee, Esq., Subordinate Judge of Zilla Mymensingh, 4th Court, dated the 13th of May, 1944.

(1) (1927) I L. R. 54 Calo. 1052.

(2) (1930) 52 C. L. J. 596; 35 C. W. N. 155.

(3) (1893) I L. R. 21 Calo. 387.

(4) (1914) 19 C. W. N. 287.

If a notice under order 21 rule 22 of the Code of Civil Procedure was actually served upon the judgment-debtor and he was apprised of the fact that the decree-holders had started proceedings for execution of the decree by delivery of possession of the properties and if in spite of the notice he remained silent, he cannot at a subsequent stage of the proceeding raise the question of limitation which must be deemed to have been decided against him when the Court made the order for execution:

Lalit Mohan Ray v. Sarat Chandra Saha (1) followed.

Nagendra v. Suresh (2) distinguished.

Latiful Huq v. Sumabudin Fattuch (3); *Firm Dedhras v. Bhagwan Das* (4); *Nandary Sriman Chandra v. Chintamani Bhatta* (5) and *Nagappa Bandappa v. Gurushantappa* (6), dissented from.

Appeal by the judgment-debtor.

Application under section 47 Civil Procedure Code objecting to the execution of the decree as barred under Article 182 of the Limitation Act.

The material facts will appear from the judgment.

Messrs. Hiralal Chakravarti, Bireswar Chatterjee and Gouri Prasad Mukherjee for the Appellant.

Dr. Nares Chandra Sen Gupta, Messrs. Birendra Kumar De and Saroj Kumar Bagchi for the Respondents.

C. A. V.

The following judgments were delivered:

Mukherjee, J.—This appeal is on behalf of the judgment-debtor and is directed against an order dated May 13, 1944, made by the Subordinate Judge, 4th Court, Mymensingh, dismissing the appellant's objections to the execution of a decree under section 47 Civil Procedure Code. The facts material for our present purposes may be shortly stated as follows: The decree which is sought to be executed was passed in a suit for partition brought by the decree-holders respondents against the appellant and other defendants in the Court of the 4th Subordinate Judge at Mymensingh. The preliminary decree is dated the 3rd April, 1938 and it was made final on the 13th August following. The

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(2) (1932) L. R. 59 I. A. 283; 55 C. L. J. 528.

(3) (1881) L. L. R. 8 Calc. 248.

(4) (1937) I. L. R. 16 Pat. 306.

(5) A. I. R. [1939] Mad. 157.

(6) (1932) I. L. R. 57 Bom. 388.

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final decree purports to have been made on the basis of a compromise. On the day that the petition of compromise was filed and the decree was passed the appellant before us, who is defendant No. 5 in the suit was admittedly absent from Court though his pleader signed the compromise petition on his behalf. On the 11th November 1938 the defendant No. 5 presented an application for setting aside the compromise decree under order 9. Rule 13 as well as under section 151 Civil Procedure Code and his contention was that the vakalatnama which purported to give authority to his pleader to act on his behalf was not signed by him at all and that the decree made was an *ex parte* decree so far as he was concerned. The trial Court dismissed the application on the 6th October, 1939 primarily on the ground that it was time-barred. Against this order an appeal was taken to this Court being F. M. A. No. 53 of 1940, and there was also an application in the alternative filed under section 115 Civil Procedure Code upon which Rule 79(M) of 1940 was issued. Both the appeal and the rule were dismissed by this Court on the 23rd July, 1943. Pending these proceedings the decree-holders filed an application for execution of the decree only for the purpose of realising the costs awarded by it, sometime in December, 1939 and this proceeding was struck off for non-prosecution on the 4th July, 1940. After the appeal against the order rejecting the application for setting aside the decree under order 9 rule 13 Civil Procedure Code was disposed of by this Court the decree-holders commenced the present proceeding on the 20th December, 1943 praying for delivery of possession of the properties in terms of the final decree made in the suit, and it was registered as O. C. Execution Case No. 58 of 1943. It was stated under column 11 of the execution petition that the proceedings in execution were stayed pending the hearing of this appeal in this Court and on this statement, which is admittedly false, the executing court, it seems, held the application for execution to be within time and directed it to be registered. The court ordered that delivery of possession of the properties might be given in terms of the final decree through a commissioner appointed by the court and arrangements were also made for police help as there was apprehension of a breach of peace. The present appellant thereupon filed his objections under section 47 Civil Procedure Code objecting to the execution of the decree on the ground that the application for execution was barred by limitation under Article 181 of the Indian Limitation Act. The court below over-ruled this objection being of

opinion that under Article 182 clause (2) of the Limitation Act time would run from the 23rd July, 1943, when the final order in appeal was made by this Court. It was further held that as the judgment debtor did not put forward his objection before the order for delivery of possession was made although he received notice under Order 21 rule 22 Civil Procedure Code he was estopped from raising this point at a subsequent stage. The propriety of the decision of the Subordinate Judge on both these points has been challenged before us in this appeal.

Now, so far as the first point is concerned, it would be clear from what has been stated above that the application for execution of the decree was presented in this case beyond three years from the date of the decree. It was also beyond three years from the date of the final order made in the previous execution proceeding. To get round the plea of limitation the decree holders relied upon clause (2) of Article 182 of the Limitation Act under which the period of limitation for executing the decree runs, when there is an appeal, from the date of the final decree or order made by the appellate court. In the case before us there was admittedly no appeal by any party from the final decree. There was an application as stated above made by defendant No. 5 for setting aside the *ex parte* final decree under Order 9 rule 13 Civil Procedure Code and section 151 Civil Procedure Code and there was an appeal against the order rejecting that application. The final order made by this court dismissing this appeal is dated the 23rd July, 1943, and the whole controversy centres round the point as to whether under clause (2) Article 182 of the Indian Limitation Act the period for execution of the final decree would be three years from the date when the appeal against the order rejecting the judgment debtor's application for setting aside the decree was finally disposed of. In an early pronouncement of this Court which is to be found reported in *Lutful Haq v. Sumbhudin Pattuck* (1), it was held that when there was an application by a defendant to revive a suit which was decreed *ex parte* against him the application would keep the decree open and the decree would not become final till the order of the appellate court was passed on the application for reviving the suit. This view however was expressly dissented from in later decisions and amongst these we may refer particularly to the cases of *Fakir Chand Mandal v. Daibacharan* (2) and *Profulla Kumar Basu v.*

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(1) (1881) I. L. R. 8 Cal. 248; 10 C. L. R. 143.

(2) (1927) I. L. R. 54 Cal. 1052.

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Sorjibala Basu (1). In the first of these cases Page and Graham JJ. held that the expression decree on appeal can only mean the decree on appeal from the decree to obtain execution of which the application is made, and an application to set aside a decree does not keep the decree open. Page J. in course of his judgment referred to several decisions of this Court as well as other High Court in India (to wit, *Jivaji v. Ramchandra* (2); *Baikanta Nath Mitra v. Anghori Nath Bost* (3) and *Bai Brijraj v. Nauratan Lal* (4)) in support of the view taken by him. In the other case Rankin C. J. and C. C. Ghose J. expressly dissented from the view taken in *Lutful Huq v. Sambhudin* (5), and held that the words "the final decree or order of the appellate court" in Article 182 (2) of the Limitation Act mean the final decree or order passed on appeal from the decree which is sought to be executed and do not include the final decree or order that may be passed on appeal from an order made in a proceeding under Order 9 rule 13 Civil Procedure Code to have the decree which is sought to be executed, set aside.

The authorities of this Court therefore are decidedly in favour of the appellant. The argument of Dr. Sen Gupta who appears for the respondents decree-holders is that the law laid down in the above cases is no longer sound and has been impliedly overruled by the Privy Council in the case of *Nagendra Nath Dey v. Suresh Chandra Dey* (6). This contention apparently received support from certain decisions of the other High Courts in India which have accepted the interpretation which Dr. Sen Gupta wants to put on the decision of the the Judicial Committee mentioned above. The question has not been considered till now by this Court and certainly requires careful examination.

Stripped of details, the facts of the Privy Council case were as follows: Mudan Mohan who was the plaintiff in a mortgage suit, in his application for final decree claimed that certain co-mortgagees who were defendants Nos. 11 and 12 in the suit had assigned their interests in his favour and consequently he was entitled to add to his own claim the shares of the mortgage money allowed to defendants Nos. 11 and 12. This claim was rejected

(1) (1930) 52 C. L. J. 594; 35 C. W. N. 155.

(2) (1891) I. L. R. 16 Bom. 123.

(3) (1893) I. L. R. 21 Cal. 387.

(4) (1917) 3 Pat. L. J. 119.

(5) (1881) I. L. R. 8 Cal. 248.

(6) (1932) L. E. 59 I. A. 283; 55 C. L. J. 528.

and a final decree was made in the usual way in favour of all the mortgagees on the 24th June, 1920. On August 27, 1920, Madan Mohan appealed to this Court and in this appeal only the decree-holders mortgagees were made parties. Not only were the judgment-debtors not made parties to the appeal but the appeal itself which purported to be an appeal from an order embodied in the final decree and not the decree itself was insufficiently stamped. The complaint of the appellant was limited to the question of assignment only which was decided against him by the trial Judge. This appeal was dismissed by this Court on the ground of irregularity as well as on its merits on August 24, 1922. On October 3, 1923, the defendants Nos. 11 and 12 who were co-mortgagees of the plaintiff presented an application to the Subordinate Judge for execution of the final mortgage decree, by sale of the mortgaged properties. It was opposed by the mortgagors judgment-debtors on the ground that it was barred by limitation under Article 182 of the Indian Limitation Act. The Subordinate Judge overruled this contention and allowed the execution to proceed. On appeal, the decision of the Subordinate Judge was reversed by a Division Bench of this Court consisting of Subrawardy and Graham, JJ. Mr. Justice Subrawardy held on the basis of the decision in *Christiana Sans Law v. Benarasi Prasad* (1), that the word "appeal" in clause (2) of Article 182 means and can only mean an appeal which is directed against the decree sought to be executed, and is of such a nature that the result of it is likely to affect the decree. Mr. Justice Graham concurring in this view observed as follows: "The decisive factor in cases of this nature appears to be whether the appeal imperils or not the whole decree for the execution of which the application was made. Applying this test it is clear that the decree as a whole was never imperilled and consequently it remained final and limitation must run from the date of the final decree and not from the date of the decision of the appeal". There was an appeal taken against this decision by the defendants Nos. 11 & 12 to the Privy Council, and their Lordships of the Judicial Committee reversed the decision of the High Court and held that there was an appeal within the meaning of Article 182(2) of the Limitation Act and time would run from the order made by the High Court. On behalf of the judgment-debtors the decision of the High Court was sought to be supported on three grounds namely, (1) that the appeal preferred by Madan Mohan on the 27th August, 1920

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was by reason of its irregularity not an appeal at all but an abortive attempt to appeal; (2) that an appeal in order to save limitation under clause (2) of the Article must be one in which the persons affected by it namely the judgment-debtors were parties and (3) that it must be also one in which the whole decree was imperilled. In their Lordships' opinion none of these contentions was of any avail to the judgment-debtors. "The question" thus ran the judgment, "must be decided upon the plain words of the Article: 'Where there has been an appeal', time runs from the date of the decree of the appellate Court". There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always to some extent be arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that so long as there is any question *sub judice* between any of the parties those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them may lead to no advantage. Nor in such a case as this is the judgment-debtor prejudiced..... But whether there be or be not a theoretical justification for the provision in question, their Lordships think that the words of the article are plain, and that there having been in the present case an appeal from the mortgage decree of June 24, 1920, time only ran against the appellants from August 24, 1922, the date of the Appellate Court's decree".

It is not disputed that their Lordships of the Judicial Committee were not called upon to decide a case like the present where the appeal was not from the decree sought to be executed or a portion of it but from an order made on an application to set aside the decree which was passed *ex parte*. Their Lordships laid particular stress on the fact that in the case before them the appeal was against the mortgage decree dated the 24th June, 1920. In their opinion the character of the appeal was altogether immaterial; it was also immaterial as to who were made parties to it and whether or not it imperilled or affected that entire decree. It was enough that there was an appeal in the sense that the appellate tribunal was invited to set aside a decision of a subordinate court and therefore it attracted the operation of clause (2) of Article 182

of the Limitation Act. In our opinion, this decision is no authority for the proposition that the appeal contemplated by Article 181(2) of the Limitation Act need not be directed against the decree which is the subject matter of execution or a portion of it and it is enough if there was an appeal from an order passed in a separate or independent proceeding the result of which might affect the decree in any event. The doctrine of imperilling the decree upon which the decision of the Judges of this Court rested was expressly reversed by their Lordships of the Judicial Committee.

Dr. Sen Gupta is undoubtedly supported in his contention by certain recent decisions of some of the other High Courts in India. In the case of *Firm Dedhras v. Bhagwan Das* (1), it was held by a Letters Patent Bench of the Patna High Court that the words "where there has been an appeal" in clause (2) of Article 182 of the Indian Limitation Act do not mean that the appeal must be against the decree in the suit. They include an appeal against an order made on an application for re-hearing of an appeal under order 41, rule 21 Civil Procedure Code. The learned Judges were of opinion that the contrary view taken in the previous decision of the Patna High Court in *Bai Brijraj v. Nauratan* (2) has been impliedly overruled by the decision of the Privy Council in *Nagendra Nath Dey v. Suresh Chandra Dey* (3). In *Nandury Sriram Chandra v. Chintamani Bhatta* (4), decided by the Madras High Court, the facts were almost identical with those of the case before us. There was also an application to set aside an *ex parte* decree and an appeal taken against the order of dismissal passed in that proceeding and it was held that time for execution of the original decree would run from the date when the final order of the appellate court was passed in the proceeding under order 9 rule 13 Civil Procedure Code. The learned Judges proceeded upon the basis of the observation of the Judicial Committee which we have set out above; and although their Lordships of the Judicial Committee were not dealing with an appeal against an order refusing to set aside an *ex parte* decree the principles contained in the passages in the judgment quoted above were according to the learned Judges wide enough to cover the present case. In their opinion, it does not necessarily follow

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(3) (1932) L. R. 59 L. A. 283; 55 C. L. J. 528.

(4) A. I. R. 1939 Mad. 157.

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that because a decree or order is mentioned in column 1 of Article 182 the appeal mentioned in column 3 must be against the decree or order. It would be equally logical to say that it must be something which affects the decree or order. With all deference to these learned Judges we are unable to subscribe to the view taken by them. In the case before the Judicial Committee the appeal preferred by the plaintiff was against the final decree in the mortgage suit. It was not against the entire decree but purported to be directed against that portion of it which negated the claims of the plaintiff which he put forward on the basis of assignment from some of his co-mortgagees. The appeal, as stated above, was defective in form and was not properly stamped. Their Lordships of the Judicial Committee held that they must go by the language of the Article and equitable considerations were quite irrelevant to the construction of a statute of limitation. The Article speaks of an appeal. Here there was an appeal directed against the decree though it was limited in its character and defective in its form. But these were immaterial if there was in fact an appeal from the decree sought to be executed. The decree-holders were entitled to the extended period of limitation provided there by Article 182(2) of the Indian Limitation Act and the question whether the appeal imperilled the entire decree or not was altogether irrelevant. In our opinion if the view taken by the Madras and Patna High Courts be accepted as sound the expression "appeal" in clause (2) of Article 182 of the Limitation Act would mean an appeal which may not be directed against the decree or order sought to be executed but has the effect of affecting or imperilling the said decree. This would be introducing, for all practical purposes, the doctrine of imperilling the decree which was expressly repudiated by their Lordships. Their Lordships definitely held that whether or not the appeal imperilled the decree was irrelevant to the enquiry and the only thing material was whether there was in fact an appeal, no matter whether it was defective in form and of a partial or fragmentary character.

Dr. Sen Gupta also drew our attention to a decision of the Bombay High Court which is to be found reported in *Nagappa Bandappa v. Gurusantappa* (1). The facts of that case were different from those of the present one. There a decree for money was reduced on an application for review presented by the

(1) (1939) I. L. R. 57 Bom. 388.

defendants. The decree-holders preferred an appeal against the order granting the review but not against the amended decree made after review. It was held that the time for execution of the new amended decree would run from the date on which the appeal against the order granting review was dismissed. If the appeal was preferred against the amended decree undoubtedly the decree-holders could invoke the provisions of clause (2) of Article 182 of the Indian Limitation Act, as a "decree" would include an amended decree as well but if there was no appeal from the amended decree it is difficult to say how the period of limitation would be enlarged by an appeal from any order passed in the course of the suit. If that is the position, limitation could also be extended by an appeal taken against a subsequent decree which might be passed in a suit to set aside the original decree which is sought to be executed. In our opinion a broad proposition like this cannot be inferred either from the actual decision of their Lordships of the Judicial Committee in *Nagendra v. Sarash* (1) or from the observations made by their Lordships in the course of the judgment which we have set out in extenso above. Dr. Sen Gupta argues that the Legislature in Article 182(2) of the Limitation Act uses the word "appeal" generally without any qualification and it cannot be limited to an appeal against a decree which is sought to be executed. He cites two classes of cases where this interpretation would lead to anomalous results. The first is where a decree is amended subsequently on an application by a party to the suit and on an appeal being taken against the amended decree the appeal is allowed and the original decree is restored. He says that time in such cases must run from the date of the appellate judgment and not from the date of the original decree which was eventually restored by the appellate Court. This would undoubtedly be the position ; but as has been said already the word "appeal" in clause (2) is wide enough to include an appeal from an amended decree. The decree that can be executed is the final decree made on appeal from the amended decree and it is quite immaterial that the appellate Court exercising its appellate powers varied the amended decree and restored the original decree of the Court. This class of cases therefore does not militate against the view taken all along in our Courts that the appeal in clause (2) of Article 182 of the Limitation Act means the appeal from the decree sought to be executed. The other class mentioned

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by Dr. Sen Gupta covers cases where an appeal is preferred against a preliminary decree and a final decree is passed subsequently which is not appeal against. If the appeal against the preliminary decree is dismissed time for execution of the final decree would run not from the date when the final decree was passed but from the date when the appellate judgment was pronounced in the appeal taken against preliminary decree. We think that this admits of an explanation for the appeal against the preliminary decree is in substance though not in form an appeal against the final decree also and the final decree has got no existence apart from the preliminary decree. But it is not necessary for us to examine all sorts of hypothetical cases that might arise for consideration. The whole question that requires decision in this appeal is whether the view taken by this Court in a series of cases to the effect that an appeal from an order rejecting an application to set aside an *ex parte* decree under order 9 rule 13 Civil Procedure Code does not extend the period of limitation for execution of the decree under Article 182(2) of the Limitation Act, has or has not been superseded by the pronouncement of the Judicial Committee in the case of *Nagendra v. Suresh* (1). For the reasons given above we are decidedly of the opinion that the answer to this question must be in the negative.

The result is that the first point raised by the appellant is quite sound and in our opinion the application for execution is barred by limitation.

The next question then arises whether the judgment debtor is estopped from raising the question of limitation at all in this present proceeding. It appears from the records that on the 20th December, 1943, when the application for execution was registered the Court directed issue of notice under Order 21, rule 22 Civil Procedure Code. The peon's report shows that on the 31st December, 1943, notice under Order 21, rule 22 Civil Procedure Code was served upon the judgment debtors including the present appellant. The orders for delivery of possession were made by the Court on the 30th March and 3rd April, 1944. The judgment debtor No. 5 presented his objection under section 47 Civil Procedure Code only on the 22nd April, 1944. It cannot be disputed that if the notice under Order 21 rule 22 was actually served upon the judgment debtor and he was apprised of the fact that the decree holders had started proceedings for execution

(1) (1939) L. R. 59 I. A. 283; 55 C. L. J. 528.

of the decree by delivery of possession of the properties and if in spite of the notice he remained silent, he cannot at a subsequent stage of the proceeding raise the question of limitation which must be deemed to have been decided against him when the Court made the order for execution. Vide the case of *Lalit Mohan Roy v. Sarat Chandra Saha* (1). The controversy thus centres round the point as to whether the notice was really served upon the appellant and he had the opportunity of putting forward his contention against the decision of the court directing delivery of possession to be made against him. The peon's report shows that the defendant No. 5 was absent from his house at the time when the peon went there to serve the notices. He had on that day gone to Netrakona in connection with a criminal case. The defendant No. 4 who is a brother of defendant No. 5 was present on the spot and he having refused to accept notice it was hung up on the fencing of the katchari barl. The peon says in his report that this service was effected in the presence of two witnesses namely Hriday Chandra Dey and Kumud Chandra Bhattacharji. Neither the peon nor the above two witnesses were examined in this case and the Subordinate Judge was apparently labouring under a misapprehension when he observed in his judgment that both the two had put their signatures on the return of the serving peon. As a matter of fact only one of the witnesses named Hriday signed the paper and not the other. Dr. Sen Gupta relies upon Order 5, rule 15 Civil Procedure Code which empowers the serving peon to serve notices on any adult male member of the family of the defendant in case the defendant cannot be found and has no agent empowered to accept the service. It does not appear from the evidence adduced in the case as to whether the peon made any enquiries about defendant No. 5 or satisfied himself that he was not likely to return very soon. Apparently, he did not wait and made no effort to serve the notice upon him personally. It is also not clear from the evidence as to whether defendant No. 4 was a member of his family. The finding of the Subordinate Judge on this point is certainly unsatisfactory and the whole matter requires re-consideration.

We would accordingly allow the appeal and set aside the judgment of the learned Subordinate Judge. The case would go back and the court below will on the evidence already recorded and on such further evidence as might be adduced by the parties

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come to a definite finding as to whether notice under Order 21 rule 22 Civil Procedure Code was duly served upon defendant No. 5. If he finds that the notice was duly served the defendant No. 5 would be deemed incompetent in law to question the order for execution that was made after the service of notice upon him under Order 21 rule 22 Civil Procedure Code. If the court decides that the notice was not duly served the application for execution will stand dismissed on the ground of limitation.

We make no order as to costs in this appeal. Future costs will be in the discretion of the court below.

Sharpe, J. :—I agree.

M. A. K.

*Appeal allowed ;
Case remanded.*

*Before Mr Justice B. K. Mukherjee and Mr. Justice
W. Mc. C. Sharpe.*

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v.

SRI SRI ISWAR SRIDHAR JEW,

DEITY REPRESENTED BY THE SHEBATS

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*Adverse possession—Adverse to endowment—Possession of alienee—Hindu
Law—Debutter—Alienation by shebait—Adverse possession against
deity—Limitation Act, Schedule I, Articles 134A to 134C and 144—
Transfer by manager, when void.*

Article 144 and not Articles 134A to 134C, Sch. I of Limitation Act which were introduced by the Amending Act I of 1929, is applicable to the facts of the present case.

When an endowed property is alienated by a manager the possession of the alienee becomes adverse as soon as he is without any title to the property. If the transfer is void *ab initio*, the possession of the transferee is adverse

* Appeal from Appellate Decree No. 1055 of 1941, against the decree of Babu Harendra Nath Banerjee, Subordinate Judge of Zilla Hooghly, 1st Court, dated the 9th of April, 1941, in Title Appeal No. 135 of 1940, affirming the decree of Eabu Gouripada Mukherjee, Munsiff, 1st Court, Arambagh, dated the 14th June, 1940.

from the very date of the transfer. If, on the other hand, it is not void but is only voidable at the instance of the succeeding manager, possession cannot be adverse until the office of the alienating mohunt ceases.

Subbaya Pandaram v. Mahamad Mustapha Maracayar (1); *Mahanik Ram Charan Das v. Naurangi Lal* (2); *Vidya Varuthi v. Bahusami* (3) followed.

Charu Chandra v. Nepan Bala (4) discussed.

Ronald Duncan Cromartie v. Sri Sri Iswar Radha Damodar Jew, (5) referred to.

Under the following circumstances a transfer by a manager of endowed property is void *ab initio*: Firstly, when he acts in negation of the trust. If the alienation is not merely of certain items of the endowed property but of the endowment as a whole, the possession of the transferee is unlawful from the very beginning and limitation would run from the date of the transfer.

Guna Sambanda Pandara Sannadhi v. Velu Pandaram (6) and *Damodar Das v. Lakshman Das* (7) followed.

Secondly, even if the subject-matter of transfer is only particular item or items of endowed property the question whether the transaction is void or voidable would depend upon the fact whether the *shesbait* or the manager purported to transfer the same in his capacity as manager or in his own individual capacity as secular owner of the property.

A *shesbait* or manager has the right to alienate portions of endowed property for purposes of legal necessity. He may exceed his powers, but if the transfer of the dely's property is by the *shesbait* or the manager as such, the transferee would, at least, acquire an interest which would be valid during the lifetime of the transferring mohunt, but if the manager transfers the property belonging to the dely as his own property asserting his own personal interest in the same his act itself is adverse to the trust. The transferee in such cases would acquire no title to the property and his possession would be unlawful from the beginning.

The same principle applies to involuntary transfers as well.

Whether the possession of the purchaser at a mortgage sale is or is not adverse to the endowment would depend upon the fact as to whether the mortgage was executed by the manager *qua* manager on behalf of the dely or in his own individual capacity as secular owner of the property in denial of the rights of the dely. In the first class of cases the mortgage is not void altogether and the purchaser at a mortgage sale would, at least, acquire an

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(2) (1933) L. R. 60 I. A. 124; 57 C. L. J. 229.

(3) (1921) L. R. 48 I. A. 302; I. L. R. 44 Mad. 431.

(4) (1938) 43 C. W. N. 102.

(5) (1935) 62 C. L. J. 10.

(6) (1899) L. R. 27 I. A. 69; I. L. R. 23 Mad. 271.

(7) (1910) L. R. 37 I. A. 147; I. L. R. 37 Calc. 885; 12 C. L. J. 110.

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interest which will endure during the lifetime of the manager. If, on the other hand, the manager asserts his own individual ownership in the property in denial of the rights of the deity and purports to act not as shebait but as proprietor of the endowed property the mortgagee would not acquire any interest by such transaction. The purchaser at the mortgage sale would be a trespasser out and out and his possession would be adverse from the date of his purchase.

Venkata Subramania v. Sivagurunatha (1) and *Alam v. Karupanaswami* (2) referred to.

Appeal by the Defendant No. 1.

Suit for declaration that the suit property is part of Debuttar property and for recovery of possession of the same under order 21 rule 103 of the Code of Civil Procedure.

The material facts will appear from the judgment.

Messrs. Rikindra Nath Sarkar, Heramba Chandra Guha, Samarendra Kumar Dutta, and Narendra Nath Banerjee for the Appellant.

Messrs. Amarendra Nath Bose and Jaineswar Majumdar for the Respondents.

Mr. Bireswar Chatterjee for the Deputy Registrar.

C. A. V.

The following judgments were delivered :

March, 27.

Mukherjee, J.:—This appeal is on behalf of the defendant No. 1 and it arises out of a suit commenced by the plaintiffs for recovery of possession of the land described in schedule A1 to the plaint on establishment of title of the plaintiff No. 1, Sri Sri Iswar Sridhar Jew, deity, to the same.

The plaintiffs are four in number of whom the plaintiff No. 1 is the Deity Sri Sri Iswar Sridhar Jew, while the other three purport to be the managing shebait of the Idol. The other shebait have been impleaded as *pro forma* defendants in the suit.

The plaintiffs allege that the land in suit along with other lands are the absolute *debuttar* property belonging to the Idol Sri Sri Iswar Sridhar Jew and are covered by *taidad* No. 24198 of the Burdwan Collectorate. Some time before 1905, all these lands were mortgaged by the then shebait of the Deity, who were four in number to one Baburam Bose, the predecessor of

(1) A. I. R. 1938 Mad. 60(64).

(2) A. I. R. 1938 Mad. 415 (416).

defendants Nos. 2 to 6, to secure an advance received from the latter. Baburam brought a suit to enforce the mortgage, and in execution of the decree obtained by him, the mortgaged properties were put up to sale and purchased by him some time in the year 1908. Since then Baburam and after his death, his successors were in possession of these properties. In the year 1932, the last of the *sherbaitis* who mortgaged the property to Baburam died, and in 1934 the present plaintiffs instituted a suit, being Suit No. 437 of 1934, against defendants Nos. 2 to 6 upon whom the interest of Baburam had devolved, to recover possession of the *debuttar* property which was alleged to have been improperly sold in execution of the decree obtained by Baburam against the then *sherbaitis*. The suit was fought up to this Court, and eventually a decree was passed in favour of the plaintiffs declaring the property to be *debuttar* and giving the plaintiffs the right to recover *khas* possession of the same.

This decree was executed in Execution Case No. 46 of 1939, and the plaintiffs took delivery of possession of all the properties in respect of which they obtained a decree. Thereupon, defendant No. 1 who is the wife of defendant No. 5 preferred a claim under Order XXI, Rule 100 of the Code of Civil Procedure complaining of dispossession from the land described in schedule *A* to the present plaint, which she alleged, she held and possessed in her own right on the strength of a purchase in Title Execution Case No. 7 of 1929. This claim petition was allowed and thereupon the plaintiffs brought the present suit under Order XXI, Rule 103 of the Code of Civil Procedure for recovery of possession of the *A* schedule land on the allegation that this was a part of the *debuttar* endowment belonging to plaintiff No. 1 and that the defendant No. 1 did not acquire any title to it by reason of her purchase at the sale held in execution of a decree obtained by a third party against defendants Nos. 2 to 6.

Two written statements were filed in the suit : One by defendant No. 1 and the other by defendants Nos. 2 to 6 jointly. Defendants Nos. 2 to 6 subsequently dropped out of the proceeding, and defendant No. 1 remained the only contesting defendant in the suit. The contentions of defendant No. 1, in substance, were that the property in suit was not *Debuttar* property belonging to the Idol Sri Sri Iswar Sridhar Jew, but it was the secular personal property of the previous mortgagors which was mortgaged and sold to Baburam, the predecessor of defendants Nos. 2 to 6 along with other properties in the year 1908 ; subsequently

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the suit property was sold in execution of a decree obtained by another person against the heirs of Baburam, and it was purchased by defendant No. 1 on 14th May, 1939, who thereby acquired a good and infeasible title to it. It was further averred that as defendant No. 1 and her predecessor had been in possession of the property all along since 1908 adversely to the endowment, the title of the Deity, if any, was extinguished by adverse possession and the plaintiffs' suit was barred by limitation.

The Trial Court negatived the contentions raised on behalf of defendant No. 1 and gave the plaintiff a decree as prayed for. There was an appeal taken to the Court of the District Judge of Hooghly, and the learned Subordinate Judge who heard the appeal dismissed the same and upheld the findings of the Trial Court. Defendant No. 1 has now come up on second appeal to this Court.

Mr. Sarkar who appears on behalf of the appellant has not challenged the finding of fact arrived at by the Courts below, that the property in suit is the *debuttar* property of Idol Sri Sri Iswar Sridhar Jiu. The contentions he has raised in support of the appeal are of a two-fold character. In the first place, he has argued that as the appellant and her predecessor were in possession of the property ever since 1908 adversely to the Deity, the plaintiffs' suit is barred by limitation. The second contention raised is that as all the *shabaitis* of the Deity have not joined as plaintiffs in the suit, and there is no averment in the plaint that those who have been impleaded as *pro forma* defendants were not willing to come as plaintiffs, the suit as framed is not maintainable.

So far as the first ground is concerned, it is conceded on both sides that articles 134A to 134C of the Indian Limitation Act which introduced by the amending Act I of 1929 have no application to the facts of the present case. The appropriate article which governs the present case is article 144 of the Indian Limitation Act, and therefore, the question for our determination is as to when the possession of the purchaser became adverse to the endowment. In *Vidya Varahi Thirtha v. Balusami Ayyar* (1), it was held by their Lordships of the Judicial Committee that when the improper alienation of a *debuttar* property by the manager was in the form of a permanent lease there was no adverse possession by the alienee within the meaning of article 144 of the Indian Limitation Act until the determination of the

(1) (1921) L. R. 481. A. 302; I. L. R. 44 Mad. 431.

office of alienating *mohunt* by death or otherwise. Soon after the pronouncement of the Judicial Committee in the above case, a question arose as to whether the same principle was applicable when the transfer was not of a limited interest merely, but was by way of sale out and out. There was some conflict of opinion expressed on this point by the Indian High Courts, but the conflict has been set at rest by the subsequent pronouncement of the Judicial Committee in *Makunth Ram Charan Das v. Naurangi Lal* (1), and it has been held that alienation of particular items of endowed property by the manager by way of sale is valid during his term of office, and consequently the possession of the alienee would not be adverse until the alienating *mohunt* ceases to be *mohunt* by reason of death, retirement or otherwise. This was a case of a private sale of some portion of the endowed property following a permanent lease of the same by the *mohunt*. When a trust property was sold in execution of personal decree against the trustee, it was held by their Lordships of the Judicial Committee in *Subbarya Pandaram v. Mahamad Mustapha Marudayar* (2) that the possession of the execution sale purchaser is adverse to the trust from the date of the sale and a suit for possession would have to be instituted within 12 years from such date. Lord Buckmaster expressly referred to the cases of *Vidya Varuthi Thirtha v. Babusami Ayyar* (3) and *Ishwar Shyam Chand Jin v. Ram Kanai Ghose* (4), in course of his judgment and repelled the contention advanced on the authority of these decisions that the possession of the transferee was not adverse till the tenure of office of the alienating trustee came to an end. "Such an argument", so runs the judgment "has no relation to the case where, as here, property has been acquired under an execution sale and possession retained throughout."

Mr. Sarkar, in support of his contention, relies strongly upon this decision, and his argument is that although in the case before the Judicial Committee, the property was sold in execution of a money decree against the trustee personally, the same principle applies when the sale is in execution of a mortgage decree against the manager. In support of the last proposition, he relies upon the decision of a Division Bench of this Court in

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(2) (1923) L. R. 50 I. A. 295; 40 C. L. J. 20.

(3) (1921) L. R. 48 I. A. 302; I. L. R. 44 Mad. 431.

(4) (1910) L. R. 38 I. A. 76; I. L. R. 38 Cal. 526; 14 C. L. J. 238.

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Ronald Duncan Cromartie v. Sri Sri Iswar Radha Damodar Jew (1). The Court of appeal below, on the other hand, practically based its decision upon a pronouncement of Jack, J. in *Charn Chandra v. Nipen Bala* (2), where the learned Judge distinguished the case of *Subbaiya Pandaram v. Mahamad Mustapha Maracayar* (3), on the ground that it dealt with a trust property and not the property of an endowment, and held further that the view indicated in this as well as other earlier cases was no longer sound in view of the subsequent decision of the Judicial Committee in *Mahant Ram Charan Das v. Naurangi Lal* (4). The point undoubtedly is of some importance and requires careful consideration.

In the case of *Vidya Varuthi v. Balusami* (5), as well as in that of *Ram Charan Das v. Naurangi Lal* (4), their Lordships of the Judicial Committee proceeded on the view that the *shabait* or manager of an endowment is at liberty to dispose of, not the endowment itself, but particular items of endowed property during the period of his life time. The grant may be for a larger period, —be it by way sale or permanent lease, but if it is not supported by legal necessity, it would be good only to the extent of the life time of the alienating manager. It follows, therefore, that the possession of the alienee is not adverse to the endowment so long as the alienating *mohunt* is in office and it becomes adverse only when the office of the latter ceases by death or otherwise. The successor of the alienating *mohunt* is consequently entitled to institute a suit for recovery of possession of the property improperly transferred, within 12 years from the date of his assumption of the office. In *Subbaiya Pandaram v. Mahamad* (3), the Judicial Committee held that this principle was not applicable when the trust property was sold in execution of a decree against the trustee personally. We cannot agree with the view taken by Jack, J. that the proposition of law enunciated in *Subbaiya's* case (3), was not accepted as correct in the subsequent pronouncement of the Judicial Committee in *Ram Charan Das v. Naurangi Lal* (4). Lord Russell of Killowen while delivering judgment in *Ram Charan Das's* case (4) referred with approval to certain observations of Lord Buckmaster in *Subbaiya's* case (3), and His Lord-

(1) (1935) 62 C. L. J. 10.

(2) (1938) 43 C. W. N. 102.

(3) (1923) L. R. 50 L. A. 295; 40 C. L. J. 10.

(4) (1932) L. R. 60 I. A. 124; 57 C. L. J. 229.

(5) (1921) L. R. 48 I. A. 302; I. L. R. 44 Mad. 431.

ships expressly observed that having regard to the facts of that case, the decision was not unnatural. In our opinion, the view taken in *Subbaya's* case (1), has not been overruled, either expressly or impliedly, by the decision in *Ram Charan Das's* case (2). In fact, the two decisions stand on entirely different grounds, and there is no conflict between them.

The true principle deducible from the cases mentioned above is, that when an endowed property is alienated by a manager, the possession of the alienee becomes adverse as soon as he is without any title to the property. If the transfer is void *ab initio*, the possession of the transferee is adverse from the very date of the transfer. If, on the other hand, it is not void but is only voidable at the instance of the succeeding manager, possession cannot be adverse until the office of the alienating *mohunt* ceases.

The question now is under what circumstances, will a transfer by a manager be void *ab initio*. The answer is that the alienation is void when the manager acts in negation of the trust. In the first place, if the alienation is not merely of certain items of the endowed property, but of the endowment as a whole, the possession of the transferee is unlawful from the very beginning, and limitation would run from the date of transfer. Vide *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (3) and *Damodar Das v. Lakkhan Das* (4). In the second place even if the subject matter of transfer is only particular item or items of endowed property the question whether the transaction is void or voidable would depend upon the fact whether the *shabait* or the manager purported to transfer the same in his capacity as manager or in his own individual capacity as the secular owner of the property. A *shabait* or manager has the right to alienate portions of endowed property for purposes of legal necessity: He may exceed his powers, but if the transfer of the Deity's property is by the *shabait* or the manager as such, the transferee would, at least, acquire an interest which would be valid during the life-time of the transferring *mohunt*, but if the manager transfers the property belonging to the Deity as his own property asserting his own personal interest in the same, his act itself is adverse to the trust.

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(3) (1899) L. R. 27 I. A. 69; I. L. R. 23 Mad. 271.

(4) (1910) L. R. 37 I. A. 147; I. L. R. 37 Calc. 885; 12 C. L. J. 110.

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The transferee in such cases would acquire no title to the property, and his possession would be unlawful from the beginning.

The same principle, we think, applies to involuntary transfers as well. In fact, it was observed by Lord Buckmaster in *Subbaya's* case (1), that there is little difference in principle between a transfer under an adverse execution and a sale by the trustee himself. If a decree is obtained against the manager in his personal capacity, and if in execution of the decree, the trust property is sold, the purchaser cannot acquire any title by his purchase and his possession would be adverse to the trust from the very beginning. That is exactly what happened in *Subbaya's* case (1), and that is why the possession of the execution sale purchaser who did not acquire any right by his purchase was held to be unlawful from the date of the sale.

We think that it is not quite accurate to say that the decision in *Subbaya's* case (1) is to be justified merely on the ground that it was an involuntary alienation,—the sale in the case being in execution of a money decree against the trustee personally ; and that the same principle cannot be applied to the case of a mortgage sale. It is true that a mortgage sale cannot rank as an involuntary sale, for it pre-supposes a voluntary act of transfer in the form of mortgage, on the basis of which the decree is passed and the property is sold. In our opinion, whether the possession of the purchaser at a mortgage sale is or is not adverse to the endowment would depend upon the fact as to whether the mortgage was executed by the manager *qua* manager on behalf of the Deity or in his own individual capacity as secular owner of the property in denial of the rights of the Deity. In the first class of cases, the mortgage is not void altogether, and the purchaser at a mortgage sale would, at least, acquire an interest which will enure during the life-time of the manager. If, on the other hand, the manager asserts his own individual ownership in the property in denial of the rights of the Deity and purports to act not as a *shebait* but as proprietor of the endowed property, the mortgagee would not acquire any interest by such transaction. The purchaser at the mortgage sale would be a trespasser out and out, and his possession would be adverse from the date of his purchase.

This we think is the correct principle that is deducible from the cases referred to above. We are glad to find that the same view has been taken by the Madras High Court in two of its

(1) (1923) L. R. 50 I. A. 295 ; 40 C. L. J. 20.

recent pronouncement, Vide *Venkata Subramania v. Sivagurunatha* (1) and *Alam v. Karuppanaswami* (2).

The observation of D. N. Mitter, J. in *Ronald Duncan Cromartie v. Sri Sri Iswar Damodar Jew* (3), expressed as it is in very wide language, seems to us to be open to criticism, but it is not necessary to discuss the matter any further, as in that case the property was expressly held not to be *debuttar* property and, therefore, the expression of opinion on the question of law cannot rank higher than a mere obiter.

Applying this test to the facts of the present case we are of the opinion that the appellant is entitled to succeed on the question of limitation. It seems clear to us that the former *shebaitis* when they mortgaged the property did so not in their capacity as *shebaitis*, but as secular owners of the property which they purported to hold in *niskar* right. The mortgage decree has not been made an exhibit in this case, but the sale certificate makes it clear that the decree in execution of which this property was sold was not against the previous *shebaitis* qua *shebaitis*, but against them in their own personal capacity, and only the right, title and interest of the defendants personally vested in the purchaser. This being the position, we are bound to hold that the purchase was void altogether, and the possession of the purchaser was adverse from the date of the sale. As more than 12 years have elapsed since that date, the suit must be deemed to be barred by limitation.

In view of our decision of the first point, it is not necessary to consider the second contention raised by Mr. Sarkar.

The result, therefore, is that this appeal is allowed. The judgments and decrees of the Courts below are set aside and the plaintiffs' suit dismissed. Defendant No. 1 is entitled to her costs in all the Courts.

Sharpe, J. :—I agree.

M. A. K.

*Appeal allowed :
Suit dismissed.*

(1) A. I. R. 1938 Mad. 60 (64)

(2) A. I. R. 1938 Mad. 415 (416).

(3) (1935) 62 C. L. J. 10.

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FULL BENCH.

*Before Mr. Justice A. L. Blank, Mr. Justice T. J. Y.
Foxburgh and Mr. Justice P. B. Chakravarti.*

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May, 27.

SUPERINTENDENT AND REMEMBRANCER
OF LEGAL AFFAIRS, BENGAL

v.

D. E. WILSONE.*

Calcutta Police Act (IV B. C. of 1866)—Section 44, prosecution under—Section 3—‘Instruments of gaming,’ definition of—Section 47, presumption under—‘Common gaming house,’ the requisite elements of—Instruments seized in course of a search on a warrant duly issued under section 46 of the Act—Distinction made in the matter of framing a charge under sections 44 and 45 of the Act—‘Person using the place’ and ‘person frequenting the place,’ if both guilty under the Act.

The principal questions for decision by the Full Bench were as follows:—

1. Do the words ‘for the profit or gain of the person owning &c. &c.’ in the definition of “common gaming house” imply that it must be proved that profit has been made by the owner or that profit to the owner is inevitable, or is it sufficient if the owner or occupier &c., expects or hopes to make a gain or profit from the use of the ‘instruments of gaming’.
2. Do the words “whether by way of charge for the use of such house &c. or instruments or otherwise” mean that the profit to the owner &c. must accrue by way of charge for the use of the house &c. or instruments, and that profit simply from the gambling is not enough.

Held, after overruling *Rangulal Sen’s* case (1), that it is impossible to read into the various definitions embodied in the Calcutta Police Act, as are relevant for deciding a case under section 44 of the Calcutta Police Act, a requirement that a profit has actually been made or that it must be inevitable to be made. It would ordinarily be quite proper to adduce evidence to prove that profit had actually been made; the phrase ‘kept or used for the profit or gain of the person’ simply implies that the person running the premises hopes to make a profit or gain by keeping or using the instruments of gaming; it does not mean that there must be proof that such a profit has been made or must inevitably be made.

The object of sections 44 and 45 of the Calcutta Police Act is to restrict or suppress gambling in some forms, and for the purpose to prevent places being run as ‘gaming dens’. The only reasonable explanation of the phrase “whether by way of charge &c.” in the definition is that the legislature wished not to restrict the meaning of the words used but to give them their widest

*Full Bench Reference No. 1 of 1947 and Government Appeal No. 12 of 1946.

(1) [1935] I. L. R. (1936) 1 Calc. 471; 41 C. W. N. 123.

meaning, and to make it clear that the profit or gain might accrue to the person either directly or indirectly.

It is sufficient, in all cases, to maintain a conviction under section 44 of the Calcutta Police Act, if the person referred to in the definition *expects* to make a profit or gain from the actual gambling.

In cases in which warrant has been issued under section 46 of the Calcutta Police Act, the presumption may be made under section 47 of the Act, that the articles or instruments recovered were kept or used for the profit or gain of the person owning, occupying or frequenting the premises, within the meaning of the section, and it will then be for the accused to prove that he did not hope for or expect any such gain or profit.

Rangulal Sen v. Emperor (1) and *J. B. Beattie and others v. Emperor* (2) overruled.

Walechar v. Emperor (3); *M. A. Adams v. Emperor* (4); *Phani Bhushan Kumar v. Emperor* (5); *Abdul Latif v. Emperor* (6); *Kali Charan Baria v. S. K. Brahmachari* (7); *Jitendra Bhushan Das v. Emperor* (8); *Raghunath v. Emperor* (9); *Emperor v. Ismail and others* (10); *Atma Ram's case* (11); *Lachhi Ram's case* (12) and *Emperor v. Chimanlal Sanhalchand* (13) dismissed.

The principle in *Emperor v. Dattaraya Shanhar Paranjpe and others* (14) followed.

Appeal under section 417 of the Code of Criminal Procedure by the Government.

The material facts will appear from the judgment.

Messrs. K. P. Khaitan and Biraswar Chatterjee for the Crown.

Mr. Moni Mukherjee for the Accused.

The following judgment was delivered:

This is an appeal under the provisions of section 417 of the Code of Criminal Procedure.

An anonymous letter was received by the Calcutta Police as a result of which Sergeant F. Watt arranged with the telephone Company to tap the line of D. E. Wilsone of suite No. 19,

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(1) (1936) 41 C. W. N. 123; L. L. R. [1937] 1 Calo. 610.

(2) (1936) A. I. R. [1937] Calo. 84; 169 I. C. 87; 38 Cr. L. J. 706.

(3) (1926) I. L. R. 53 Calo. 718.

(4) (1935) 39 C. W. N. 1114; I. L. R. 62 Calo. 1093.

(5) (1936) I. L. R. [1937] 1 Calo. 471.

(6) (1937) I. L. R. [1938] 1 Calo. 672.

(7) (1938) 42 C. W. N. 1232.

(8) (1940) 45 C. W. N. 24.

(9) (1918) 16 A. L. J. 760.

(10) (1927) I. L. R. 49 All. 562.

(11) (1924) I. L. R. 46 All. 447.

(12) A. I. R. (1922) All. 61; 20 A. L. J. 218.

(13) A. I. R. (1945) Bom. 305.

(14) (1923) I. L. R. 47 Bom. 960.

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23 Central Avenue, Calcutta and to listen in to his conversations. On December 29, 1945 Sergeant Watt listened in and heard bets being made in the races. He made a note of the bets made and submitted a report to the Deputy Commissioner. A warrant to search the premises was issued under the provisions of section 46 of the Calcutta Police Act, by H. N. Sircar, Deputy Commissioner of Police, and the premises were duly searched between 12-30 P.M. and 1-45 P.M. on December, 29, 1945 by Inspector M. A. Rahman and Sergeant Watt in the presence of two search witnesses. The Police Officers found among other articles a type-writer with a piece of paper in it, bearing name of horses and amounts of money; *khata* books with names of horses and amounts of money written in them, slips of paper on which were written or typed the names of horses and amounts of money, a bookmaker's betting Car No. 762 in the name of M. R. Agarwal, race books and letters and cables from H. A. Cocks of Bombay referring to betting transactions with Wilsone and containing a promise to help Wilsone over a book-maker's licence.

As a result Wilsone was prosecuted for an offence punishable under section 44 of the Calcutta Police Act.

Three prosecution witnesses were examined; they proved that Sergeant Watt had listened in to telephone communications, and they proved the search. The accused pleaded not guilty and filed a written statement in which he denied having done any business on horse racing at his residence. He admitted a keen interest in racing and explained the presence of the articles found by the Police by saying that he was a contributor of Racing Notes to the "Sporting Times" of Bombay and also that he occasionally obliged his particular friends by putting their money on horses at the Totalizators and collecting their winnings for them. No defence witnesses were examined.

On this material the learned Presidency Magistrate held that the slips of paper recording bets, were 'instruments of gaming' as defined in section 3 of the Calcutta Police Act, but he held further, relying on the decision of a Division Bench of this Court in *Rangulal Lal Sen v. King-Emperor* (1), that it was necessary for the prosecution to establish that the profit or gain to the accused should accrue otherwise than as a result of betting, and that under section 47 of the Calcutta Police Act there was no presumption that the place was a common gaming house merely

(1) (1936) 41 C. W. N. 123; I. L. R. [1937] 1 Cal. 619.

because instruments of gaming had been found therein, in the course of a search on a warrant duly issued under section 46 of the Act. He accordingly acquitted the accused.

The Superintendent and Remembrancer of Legal Affairs appealed against the acquittal, on behalf of the Government of Bengal, and the appeal came up for hearing before a Division Bench. The Judges of the Division Bench expressed the opinion that *Ranga Lal Sen's* case (1), had been wrongly decided and they referred two questions to the Full Bench *etc.*

(1) Where the persons owning, occupying, using or keeping a house, room, tent, walled enclosure, space, vehicle or place in which instruments of gaming are kept or used for his profit or gain obtains his profit or gain or seek to obtain them solely from the part he takes in the actual gaming, is such house, room, tent, enclosure, space, vehicle or place, a common gaming house within the meaning of the definition in section 3 of the Calcutta Police Act (IV of 1866)?

(2) Was the case of *Rangulal Sen v. Emperor* (1), rightly decided in so far as it determined that the answer to the above question is in the negative?

By a subsequent order, according to the rules of this Court, the Division Bench referred the whole appeal to the Full Bench for disposal.

When the appeal was heard, Mr. Mukherji, for the respondent made it clear that he did not support the decision in *Rangulal Sen's* case (1). But he contended that his client had been rightly acquitted because it was necessary, in a case under section 44 of the Calcutta Police Act, for the prosecution to prove that the owner, occupier etc., had actually made a profit out of the instruments for gaming kept on the premises, and that such proof was lacking in the present case.

It was not disputed that the accused Wilsons was the occupier of the flat in question. The questions for consideration were whether that flat constituted a common gaming house as defined in the Calcutta Police Act, and whether the accused kept or used it as such.

In Section 3 of the Calcutta Police Act, we find these definitions—

"Gaming" includes wagering or betting (except wagering or betting upon a horse race) when such wagering or betting takes place—

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(1) (1936) 41 C. W. N. 123; I. L. R. [1937] 1 Cal. 610.

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(a) on the day on which such race is to be run, and
(b) in an enclosure which the Stewards controlling such race have, with the sanction of the Local Government, set apart for the purposes—

But does not include a lottery.

"Instruments of gaming" includes any article used as a means or appurtenance of or for the purpose of carrying on or facilitating gaming; and "common gaming house" means any house, room, tent or walled enclosure, or space, or vehicle, or any place whatsoever, in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room, tent, enclosure, space, vehicle or place whether by way of charge for the use of such house, room, tent, enclosure, space, vehicle, place or instruments or otherwise howsoever.

Section 46 of the Act provides for the issue of warrants for the search of premises believed to be a common gaming house.

Section 47 of the Calcutta Police Act reads—"When under the provisions of the last preceding section, any cards, dice, gaming table or cloth, board or other instruments of gaming, are found in any house, room or place, or about the person of any of those who are found therein, it shall be evidence until the contrary is made to appear that such house, room or place is used as a common gaming house and that the persons found therein were there present for the purpose of gaming although no play was actually seen by the Police Officer or any of his assistants".

Mr. Mukherjee at first argued that the articles found in the search of the flat of the accused were not instruments of gaming as defined in the Act, but when we drew his attention to the letters of H. A. Cocks, he did not press this argument further. It is sufficient for us to say that we are satisfied that these articles are instruments of gaming.

The questions for our consideration are :

1. Do the words 'for the profit or gain of the person owning &c., &c.,' in the definition of "common gaming house" imply that it must be proved that profit has been made by the owner or that profit to the owner is inevitable, or is it sufficient if the owner or occupier &c., expects or hopes to make a gain or profit from the use of the instruments.

2. Do the words "whether by way of charge for the use of such house &c., or instruments or otherwise" mean that the

profit to the owner &c, must accrue by way of charge for the use of the house &c., or instruments, and that profit simply from the gambling is not enough.

Before considering the decisions of this Court, it is interesting to see how the sections have been interpreted by other High Courts in India.

Three decisions of the Allahabad High Court were placed before us. All deal with a form of gambling known as Satta. The prosecutions were under the Public Gambling Act (Act III of 1867) as amended by the United Provinces Public Gambling Amendment Act (Act I of 1917). The definition of common gaming house in that Act is word for word the same as in the Calcutta Police Act.

In *Lachchi Ram v. Emperor* (1), it was found that Lachchi Ram was the occupant of a shop which was raided by the police while wagering was actually in progress, and that tickets were found in the shop which were used as forms of memoranda on which to record wagers. It was held by a Division Bench that "the tickets were instruments of gaming" but in themselves they could not be said to be used for his profit or gain.

"In order to sustain the conviction the words 'for the profit or gain of' would have to be read as meaning for the purpose of carrying on the gaming. But they cannot be read in that way as such an interpretation would make the words a meaningless redundancy".

The Court therefore concluded that "it must be established that the owner or occupier takes a fixed commission which is irrespective of the result of the gambling, or at least that he manipulates the conditions in such a manner that he cannot possibly lose.

Emperor v. Atma Ram (2) is a decision by a Full Bench: and the reference to a Full Bench was made in view of the decisions in *Lachchi Ram v. King-Emperor* (1) and *Emperor v. Durga Prasad* (3).

The learned Judges referred to previous decisions of their own Court, in particular *Raghunath v. Emperor* (4), and observed "It will thus be seen that although the views of all the Judges of this Court may not agree, three Judges have definitely ruled

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(1) (1922) A. I. R. All. 61; (1922) 20 A. L. J. 218.

(2) (1924) I. L. R. 46 All. 447.

(3) (1923) I. L. R. 45 All. 258.

(4) (1918) 16 A. L. J. 760.

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that the words 'used for the profit or gain of the person owning the house "must be strictly proved by evidence". They then suggested for the consideration of the local Government a slight amendment of the section, and proceeded to hold that inasmuch as a warrant had been issued under section 5 of Act I of 1917 by the District Magistrate, the conviction of Atma Ram was justified even under the restricted meaning given to the section in the case of *Lachchi Ram* (1) in view of the presumption arising under section 6 of the Act.

In *Emperor v. Ismail and others* (2) Boys, J. held that the Full Bench in *Atma Ram's* case (3) had not accepted as correct the view in *Lachchi Ram's* case (1) and he dissented from *Lachchi Ram's* case (1) in these words "if I had to decide the point I should unhesitatingly hold that it was not necessary to prove that profit was certain to result. In my opinion a mere expectation of profit would suffice."

The Bombay High Court has consistently refused to accept the restricted interpretation placed on the definition of a common gaming house, in *Lachchi Ram's* case (1).

The Bombay cases arise out of prosecutions under the Prevention of Gambling Act (Bombay). Common gaming house is defined in section 3 of the Act in terms which are essentially the same as in the Calcutta Police Act.

In *Emperor v. Dattaraya Shankar Paranjpe and others* (4) reliance was placed by the defence on *Lachchi Ram's* case (1), but the learned Judges after expressly dissenting from that decision, observed. "It is sufficient if the house is one in which instruments of gaming are kept or used for the profit or gain of the person keeping or using such place, i. e. whether the person keeping or using the house knows that profit or gain will in all probability result from the house of the instruments of gambling. The profit or gain may not actually result from the use. But if profit or gain is the probable and expected result of the game itself and if that is the purpose of keeping or using the instruments it would be sufficient in my opinion, to bring the case within the scope of the definition."

In *Emperor v. Chimanlal Sanhalchand* (5), it was held that

(1) A. I. R. (1922) All. 61; (1922) 20 A. L. J. 218.

(2) (1927) I. L. R. 49 All. 562.

(3) (1924) I. L. R. 45 All. 447.

(4) (1923) I. L. R. 47 Bom. 960.

(5) A. I. R. (1945) Bom. 305.

"even the hope of making a profit out of the gambling itself is sufficient to satisfy the requirement of the definition of common gaming house".

A number of Calcutta cases were before us. The earliest of these is *Wulochar v. Emperor* (1). In that case the defence was that the accused merely charged a commission on bets placed by members of a club but did not otherwise engage in betting. The Court held that the provisions of section 46 of the Calcutta Police Act had not been strictly complied with and that accordingly no presumption arose under section 47 of the Act.

The Court upheld the convictions on the finding that betting was going on between the appellants who kept the premises and the members of the Club (Per C. C. Ghose, J.) and that "it was the appellants who were themselves taking bets for their own profit and gain" (per Chotzner, J.). Thus instead of the Court holding, as Henderson, J. supposed in *Rangalal Sen's* case (2) that the profit or gain must be made otherwise than from the actual gambling, the defence of the accused and the decision of the Court were exactly the opposite. It was not suggested in this case either that the profit or gain must arise otherwise than from the gambling, or that the profit to the owner or occupier must be 'certain'.

The next case cited is *M. A. Adams v. The Emperor* (3). The material facts of that case are: The police armed with a warrant under section 46 of the Calcutta Police Act, raided the premises of the Harlequin Club, 15 Park Street, Calcutta. In one room they found a Billiard Table, bench and looker. In the adjoining room were card table chairs and a small side board. A number of people and some betting slips were found on the premises.

Costello, J. found that 'M. A. Adams was running this club himself and took the subscriptions of the members, or at any rate he took the profits accruing from the use of the billiard table, or from the sale of refreshments, or, money accruing in respect of bar account and so on'. He also held that it was not a case of Adams making a profit by way of charge for the instruments, nor was there any suggestion that any profit or gain accrued to Adams otherwise than by reason of the fact that he was running this club as one man concern."

(1) (1926) I. L. R. 53 Cal. 718.

(2) (1936) I. L. R. [1937] 1 Cal. 610 ; (1936) 41 C. W. N. 123.

(3) (1935) 39 C. W. N. 1114.

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The Court found that the betting slips were instruments of gaming and that the accused were rightly convicted.

In this case there was no occasion to consider whether profit or gain merely from the gambling would be sufficient to justify a conviction.

In *Phani Bhushan Kumar v. Emperor* (1) decided by Nasim Ali, J., the accused was an assistant in the office of the Deputy Accountant General Post and Telegraphs. His desk and his person were searched on a warrant issued under section 46 and betting slips and money were seized.

The conviction under section 44 was upheld. In this case there could not possibly be any question of a profit by way of charge for the place or instruments, and no suggestion was made that the profit arose otherwise than from the betting.

In *Rangalal Sen v. Emperor* (2), the facts were there: There was a shop at 17 Park Street, Calcutta known as Eastern Drug Stores. Dr. Ranga Lal Sen was allowed by the proprietors of the Drug Stores to use one of the rooms as a consulting room. The police searched that room and found Dr. Ranga Lal Sen actually filling in a betting slip. They found other betting slips in a drawer.

In the judgment Henderson, J. referred to *Waboskar v. Emperor* (3) and observed. "In that case betting was carried on in the premises and fees were realised by the persons who were in charge of the place" and he also referred to the judgment of Costello, J. in *Adam v. Emperor* (4). He then proceeded "we respectfully agree with what is stated there. In our opinion the definition of a common gaming house implies that altogether apart from the money which may be made or lost at the actual gaming, some sort of profit must be made by the person referred to in the definition".

It seems to us that the findings of fact in *Waboskar's* case (3) were not correctly stated by Henderson, J. and that there is nothing in Costello, J.'s judgment in *Adam's* case (4) from which Henderson, J.'s conclusion can be drawn.

Mitter, J. in his judgment observed "To satisfy the second element, it is my view that the intended gain must result to the person owning, occupying, using or keeping the place otherwise

(1) (1936) I. L. R. [1937] 1 Cal. 471.

(2) (1936) I. L. R. [1937] 1 Cal. 610; (1936) 41 C. W. N. 123.

(3) (1926) I. L. R. 53 Cal. 718.

(4) (1935) 39 C. W. N. 1114; I. L. R. 62 Cal. 1093.

than as a result of betting by him." But he did not give his reasons for coming to that conclusion nor case the conclusion on any authority.

The case of *J. B. Beattie and others v. Emperor* (1) came before Cunliffe and Henderson, JJ. Cunliffe, J. in his judgment observed: "The views of the Judges of this Court, as I understand, are that such premises are not strictly within the meaning of the language of the Act unless some fixed charge or profit accrues regularly to the person who is occupying or keeping the premises quite apart from any fluctuating profit which may occur from time to time between the gamblers themselves as a result of the gambling". But later in his judgment the learned Judge observed "whereas I do consider myself more or less bound by considered judicial opinion of the Judges of this Court with regard to the view they have taken as to the definition of a common gaming house contained in the Act, I am by no means sure if I had been sitting on one of those Benches of this Court, which considered the exact legal implication of the language that I should have been able to agree with my brother Judges. I think I should have been inclined to take the wider view of the words 'otherwise however' which is apparently the law on the Bombay Side." Henderson, J. merely observed that he had nothing to add to his judgment in *Ranga Lal Sen's case* (2).

The next case is *Abdul Latif v. Emperor* (3) decided by Mukherjee, J. Reference is made in the judgment to the decision in *Ranga Lal Sen's case* (2) and the learned Judge certainly did not express any dissent from that decision. But the learned Judge was not impressed with the argument that the finding of betting slips did not show that any profit or gain accrued to the appellant otherwise than as a result of the betting by him; and he held that under section 47 the find of instruments of gaming justified the inference that they were kept or used for profit or gain as contemplated by the section.

In *Kali Charan Bania v. S. K. Brahmachari* (4) decided by M. C. Ghose, J. the head note reads :

"Obiter :—In order to constitute a common gaming house it is sufficient that the house is kept and used for receiving unauthorised

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(1) (1936) A. I. R. (1937) Calo. 84; (1936) 169 I. C. 87; (1936) 38 Cr. L. J. 706.

(2) (1936) 41 C. W. N. 123; (1936) I. L. R. [1937] 1 Calo. 611.

(3) (1937) I. L. R. (1938) 1 Calo. 672; 67 C. L. J. 82.

(4) (1938) 42 C. W. N. 1232.

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bets ; it is not further necessary to prove that the accused made any profits beyond the profits of betting."

In *Jitendra Bhushan Das v. The Emperor* (1), Edgley, J. held that the warrant was illegal "and that accordingly no presumption arose from the finding of instruments of gaming," and he held that it must be proved by independent evidence that the accused made a profit. There is nothing in the judgment to show that the learned Judge considered whether it was necessary to prove that profit was actually made or whether it would suffice if it were proved independently that the instruments were kept or used by the accused in the hope of making profit.

It is thus clear that the Bombay High Court has consistently held that it is sufficient to prove that the instruments of gaming were kept or used, in the hope that profit or gain would accrue to the owner, and that the profit or gain might accrue merely from the gaming. The Allahabad High Court originally took a different view but the latest decision is the same as in Bombay.

In Calcutta the only decisions clearly laying down that the profit or gain must accrue otherwise than from the gambling are the two decisions to which Henderson, J. was a party viz., *Ranga Lal Sen v. Emperor* (2) and *J. B. Beattie v. Emperor* (3). The decision of Nasim Ali, J. in *Phani Bhushan Kumar v. Emperor* (4) is inconsistent with those decisions ; and in *Kali Charan Banja v S K. Brahmachari* (5), M. C. Ghose, J. expressly dissented from the decision in *Ranga Lal's* case (2).

In *J. B. Beattie v. Emperor* (3), Cunliffe, J. reluctantly agreed with Henderson, J. in the belief that he was following decisions accepted generally in this Court.

In *Ranga Lal Sen's* case (2), Henderson, J. appears to deduce the result from Costello, J.'s judgment in *Adam's* case (6) and from the judgment in *Walshkar's* case (7) but there is nothing in those judgments to justify this. R. C. Mitter, J. gave no reasons and no authority as the grounds for his decision.

It is clear therefore that there has been divergence of opinion on the subject, that the view expressed by Henderson, J. and

(1) (1940) 45 C. W. N. 24.

(2) (1936) 41 C. W. N. 123 ; (1936) I. L. R. [1937] 1 Calc. 611.

(3) (1936) A. I. R. [1937] Calc. 84 ; 169 I. C. 87 ; 38 Cr. L. J. 706.

(4) (1936) I. L. R. [1937] 1 Calc. 47.

(5) (1938) 42 C. W. N. 1232.

(6) (1935) 39 C. W. N. 1114 ; I. L. R. 62 Calc. 1093.

(7) (1926) I. L. R. 53 Calc. 718.

R. C. Mitter, J. has not been generally adopted, and that no arguments in support of the view are to be found in any of the judgments except *Lakshmi Ram's* case (1). Such being the case, it is necessary to examine the words of the section and decide what is their ordinary meaning.

In the first place it is to be observed that betting for the purposes of this Act, is merely a form of gaming, and the words of the definition of 'common gaming house' must apply equally to a house where betting is carried on as to a house where other forms of gaming flourish. Thus the terms must have the same meaning when applied to a house where betting is carried on, as to a casino where there is gambling on roulette or other games of chance, or a house where machines such as fruit machines are kept.

Reference to sections 44 and 45 shews that a distinction is made between the person using the place and persons frequenting the place, and that by the term 'person using such house' in the definition is meant someone such as a licensee or tenant of the building who is running a gambling den and not merely one of the people who frequent it. The definition merely requires that instruments of gaming be kept or used on the premises for the profit or gain of the person who runs the place 'whether by way of charge for the use of such house, room, tent, enclosure, space, vehicle, place or instruments or otherwise howsoever.'

The ordinary meaning of the words 'kept or used for the profit or gain of the person' is simply 'kept or used with the object of making profit or gain for the person'. There is nothing in the ordinary use of the words to suggest that profit or gain must have been made or even must inevitably be made. It is obvious that in all games of chance there must be a chance of gain and a chance of loss; otherwise people would not gamble. In the case of roulette, the punter must occasionally win, otherwise he would not punt. But the roulette wheel is so constructed that in the long run the Bank will win. Similarly, with a fruit machine, the gambler must occasionally win, otherwise he would not gamble. But the machine is so constructed that over a period, the gamblers are almost certainly bound to lose. In gambling with a book-maker, experience shews that the position is similar. The Book-maker who accepts bets on every horse in a race, cannot expect all of them to lose and must therefore accept to lose on some of the bets, yet expect to make a profit as a result of the sum total

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of the betting, and in general is able to make his book so that he does so. It seems to us impossible to read into the words of the definition a requirement that a profit has actually been made or that it must inevitably be made. It would ordinarily be quite impossible to adduce evidence to prove that profit had actually been made; and there seems to be no reason for assuming that the Legislature meant to impose an impossible condition. Nor could it even be said in connection with most forms of gambling that a profit must inevitably be made within a limited period. The most that can be said is that the prospects of profit to the Bank in the case of roulette, and to the owner of a fruit machine are extremely rosy. In our opinion the phrase 'kept or used for the profit or gain of the person' simply implies that the person running the premises hopes to make a profit or gain by keeping or using the instruments of gaming; it does not mean that there must be proof that such a profit has been made or most inevitably be made.

The next question concerns the meaning of the phrase 'whether by way of charge.....or otherwise howsoever'. Now it is obvious that the object of sections 44 and 45 of the Act is to restrict or suppress gambling in some forms, and for the purpose to prevent places being run as "gambling dens".

It would be strange if the legislature in attempting to attain such an end, were to restrain only conduct which may accompany the gambling, but which does not necessarily do so.

It would be passing strange if the Legislature were to approve of a casino to which everybody including the very poorest could enter freely and gamble at roulette or on fruit machines, and were to disapprove of a similar place from which the poorer classes were kept away by the imposition of an entrance fee.

It seems to us clear that the Legislature, without interfering with ordinary gambling among friends, sought to prevent (otherwise than at the places and times mentioned in the exception in the definition of gambling) people making a business of gambling, and attracting others with the hope of making a profit out of them.

The definition of 'common gaming house' would be quite intelligible if the phrase 'whether by way of charge.....or otherwise howsoever' were deleted. In that case, a question might arise whether the profit or gain accruing indirectly from the use of the instruments of gaming was covered; but it would not be possible to argue that profit arising directly from the use of those instruments would be insufficient.

The phrase "whether by way of charge &c," is obviously explanatory, and it seems unreasonable to hold that an explanation should be added to a definition, which is not really inconsistent with the definition. Moreover, if it was intended that by adding of such an explanation the application of the definition should be restricted, it is strange that words of such wide import as 'or otherwise howsoever' should be used. The only reasonable interpretation of the addition of this phrase to the definition is that the Legislature wished not to restrict the meaning of the words used but to give them their widest meaning, and to make it clear that the profit or gain might accrue to the person either directly or indirectly.

We are definitely of the opinion that it is sufficient, if the person referred to in the definition expects to make a profit or gain from the actual gambling.

We therefore answer the first question submitted by the Division Bench in the affirmative and the second question in the negative.

At the same time we respectfully agree with the learned Judge who decided *Lakshi Ram's* case (1) that the words "instruments kept or used for the profit or gain of the person....." are not simply equivalent to "instruments kept or used for the purpose of gaming," though we are unable to agree with the conclusions they deduced. The position of the person (i. e. the owner, occupier, user or keeper of the place) must be such that his prospects of profit or gain are not merely the same as those of the persons who visit the establishment.

But, in all cases, in which a warrant has been issued after strict compliance with the provisions of section 46 of the Calcutta Police Act, and 'cards.....or other instruments of gaming' have been found on the premises, the presumption may be made under section 47 of the Act, that the cards &c, were kept or used for the profit or gain of the person owning or occupying the premises, within the meaning of the section, and it will then be for the accused to prove that he did not hope for or expect such profits.

Turning now to the facts of the present case, we are satisfied that instruments of gaming were found on the premises and that the respondent was the occupier of those premises. As the accused was unable to rebut the presumption arising under section 46 of

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the Act, we are further satisfied that the instruments of gaming were kept or used for the profit or gain of the respondent. In this view the respondent ought to have been convicted.

We therefore order that the appeal be allowed, the acquittal be set aside and that the respondent be convicted and sentenced under section 44 of the Calcutta Police Act to pay a fine of Rs. 500 and in default to undergo rigorous imprisonment for 3 months. Let the Typewriter be returned to the accused and the other instruments of gaming be destroyed.

S. K. B. ; S. C.

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Before Mr. Justice B. K. Mukherjee.

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DALILUDDIN MINOR AND OTHERS.*

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Jurisdiction—Application for execution, where to be made—Munsiff specially empowered under Village Self Government Act (I B. C. of 1899), section 91 sub-sections (1) and (2)—Union Court granting a decree unable to effect satisfaction—Certificate under sub-section (1) of the section—Decree-holder intending to apply for execution in the Civil Court—If empowered by a notification under section 19(2) of the Bengal, Agra and Assam Civil Courts Act (XII of 1887) to try suits under section 13 of the said Act.

Section 91(2) of the Village Self Government Act has not in view the provision of section 19(2) of the Bengal, Agra and Assam Civil Courts Act but that of section 13 of the Act by which the local limits of jurisdiction of a particular Court are fixed and determined.

Held, that a decree-holder obtaining a decree under sub-section (1) of section 91 of the Village Self Government Act intending to execute the certificate obtained thereunder must file the execution petition under sub-section (2) of section 91 of the Act in the Court of the Munsiff within the local limits of whose jurisdiction the Union Court is situated (under the provisions of section 13 of the Bengal Agra and Assam Civil Courts Act) and not in the Court of the Munsiff specially empowered under sub-section (2) of section 19 of the Bengal Agra and Assam Civil Courts Act.

*Civil Revision Case No. 292 of 1945, against the order of Babu Ramesh Chandra Sen Gupta, dated the 4th December, 1944, reversing that of H. Ali, Esq., Sadar Munsiff of Faridpur, dated the 12th February, 1944.

Application for Revision by the Judgment-debtors.

Application for setting aside execution sale.

The material facts appear from the judgment.

Mr. Jitendra Kumar Sen Gupta for the Petitioners.

Mr. Shambhu Nath Banerjee (Sr.) for the Opposite Parties.

The judgment of the Court was as follows :

The predecessor of opposite parties Nos. 1 to 7 in this Rule obtained a decree against the petitioners in the Union Court of Talma in the District of Faridpur for a sum of Rs. 42 only. The Union Court being unable to effect satisfaction of the decree granted a certificate to the decree-holders under section 91(1) of the Village Self Government Act, and the decree-holders thereupon presented an application for execution of the decree in the Court of the Sadar Munsiff of Faridpur on the 2nd May, 1942. On the 18th November, 1942, certain properties belonging to the judgment-debtors were put up to sale and purchased by the decree-holders themselves. This sale was confirmed on the 6th January, 1943. On the 24th January, 1943 the judgment-debtors started a proceeding for setting aside the sale under Order XXI, Rule 90 of the Code of Civil Procedure, and it was registered as Miscellaneous Case No. 130 of 1943.

Though the application was headed under Order XXI, Rule 90 of the Code of Civil Procedure, one of the grounds put forward by the judgment-debtors in impeaching the validity of the sale was that the Court of the Sadar Munsiff at Faridpur had no jurisdiction to entertain the application for execution of the decree of the Union Court and the sale held by that Court was null and void. The Munsiff who heard the application gave effect to this contention and held that the only Court which could execute the decree was the Court of the Munsiff at Bhanga. The result was that the sale was set aside and the application for execution was returned to the decree-holders to be presented to the proper Court.

On appeal, this judgment of the Munsiff was set aside, and the learned Subordinate Judge who heard the appeal came to the conclusion that the Sadar Munsiff of Faridpur was competent to entertain the application for execution and to put up the properties to sale. The lower appellate Court sent the case back to the Sadar Munsiff of Faridpur in order that the application under Order XXI, Rule 90 of the Code of Civil Procedure might be heard and disposed of on its merits. It is against this order that the present Rule has been obtained.

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Mr. Sen Gupta appearing in support of the Rule contended before me that under section 91(2) of the Village Self-Government Act, the Court of the Sadar Munsiff at Faridpur was not competent to execute the decree of the Union Court, and consequently the decision of the Trial Court was right and the sale should be set aside as null and void for want of jurisdiction.

Now sub-section (1) of section 91 of the Village Self Government Act (I of 1899) provides that—

"If the Union Court granting a decree is unable to effect satisfaction thereof, it shall grant the decree-holder a certificate to that effect stating the amount due to him and the amount due on account of fees under section 90".

Sub-section (2) then lays down that

"Any decree-holder wishing to execute a decree of a Union Court may apply to the Court of the Munsiff within the local limits of whose jurisdiction the Union is situated....."

It is not disputed that police station Nagarkanda within which the Union Court of Talma is situated is assigned to the Court of the Munsiff of Bhanga under section 13 of the Bengal Agra and Assam Civil Courts Act (XII of 1887). The learned Subordinate Judge, however, points out that although that Union is situated within the local limits of the jurisdiction of the Munsiff's Court at Bhanga, the Sadar Munsiff was also competent to entertain the application for execution of the decree and put up the property to sale. It is said that by a notification under section 19(2) of the Bengal, Agra and Assam Civil Courts Act, Babu Prosad Chandra Banerji who was the Sadar Munsiff at Faridpur at the time when the application for execution was filed was invested with powers to try suits up to the value of Rs. 2000 arising within the entire district of Faridpur. His successor, Mr. Ali, who ordered the property to be sold had also similar jurisdiction conferred upon him. It was held in these circumstances that even though it might be irregular to file the application for execution in the Court of the Sadar Munsiff at Faridpur, that Court being presided over by the officers mentioned above was not incompetent to execute the decree.

It seemed to me at first sight that this reasoning was sound but a plain reading of section 91(2) of the Village Self Government Act convinces me that the Legislature in enacting that provision had in mind a particular Court of Munsiff within the local limits of whose jurisdiction the Union Court is situated as contemplated by section 13 of the Bengal, Agra and Assam Civil Courts

Act. The local limits of a Court's jurisdiction are fixed and determined under section 13 of the Bengal Agra and Assam Civil Courts Act, and it is not disputed that in the present case the area within which the Talma Union Court is situated is within the jurisdiction of the Court of the Munsiff at Bhanga. Section 19(2) of the Bengal Agra and Assam Civil Courts Act, in my opinion, does not fix the local limits of a particular court. It confers additional powers upon particular Munsiffs by which their jurisdiction is extended; these additional powers do not vest in the officer concerned, and so long as that officer is attached to and presides over a particular Court, the latter can certainly entertain suits or proceedings which are ordinarily outside its jurisdiction; but section 91(2) of the Village Self Government Act in my opinion has not in view the provision of section 19(2) of the Bengal, Agra and Assam Civil Courts Act but that of section 13 of the Act by which the local limits of jurisdiction of a particular Court are fixed and determined.

In my opinion, therefore, the view taken by the Trial Court is right and the judgment of the lower appellate Court should be set aside.

The result, therefore, is that this Rule is made absolute. The order of the lower appellate Court is set aside and that of the Trial Court restored and affirmed.

I make no order as to costs in this Court.

S. K. B.; A. T. M.

Rule made absolute.

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APPELLATE CIVIL.

Before Mr. Justice Mac. C. Sharpe.

CIVIL.

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January, 24, 25.

HANGSA KALITA AND OTHERS

v.

PRODIPRAI DEKA.*

Suit, maintainability of—Right of way—Obstruction—Public nuisance—Proof of special damage—Obstruction to village pathway—Public highway—Civil Procedure Code (Act V of 1908), section 91 order 1 rule 8—Non-compliance with the provisions of order 1 rule 8 Civil Procedure Code—Civil Procedure Code, order 18 rule 4, effect of non-compliance with.

If the obstruction complained of relates to a public highway, or in other words, if the suit is for removal of a "public nuisance", the plaintiffs will have to establish special damage in order to avoid the bar of section 91 Civil Procedure Code but in the case of an obstruction to a village pathway no question of special damage can arise. There is a distinction between a public highway and a village path and a suit is maintainable when a right to a village pathway is the subject-matter of litigation even in the absence of special damage. The question whether a path is a village path or a public highway is a material question of fact to be decided after hearing all available evidence and a summary decision that the way was a public highway and that a suit was not maintainable in absence of any proof of special damages is improper.

An omission to comply with the provisions of order 1 rule 8 Civil Procedure Code which is an enabling section does not stand as a bar to the plaintiffs' suit, if the plaintiffs have a right to relief independently of other persons having the same interest, though a decision in the absence of such persons will not affect their interests if they are not made parties in the suit.

Held further, that the provisions of order 18 rule 4 should not be ignored and the summary disposal of a suit without giving the plaintiff any opportunity of rebutting the objection which was specifically indicated for the first time in the cross-examination of one of the plaintiffs is neither fair nor proper. The Court cannot summarily over-ride the provisions of order 18 rule 4, Civil Procedure Code and refuse to examine witnesses in attendance. Where a suit is being summarily dismissed on the finding that the path in question is a public way and that there is no proof of special damage, both substantial questions of fact, the provisions of order 18 rule 4, Civil Procedure Code cannot be ignored and the order for summary dismissal in such cases is unfair and improper.

*Appeal from Appellate Decree No. 5 of 1943, against the decrees of N. L. Hindley, Esq., District Judge of Assam Valley District, Darrang, dated the 7th August 1942, affirming that of H. N. Deka, Esq., Munsiff of Mongoldol, dated the 27th May, 1942.

Surendra Kumar Basu v. The District Board of Nadia (1); *Biswas Patkai v. Harbans Lal* (2); *Mt. Ram Kali v. Munnalal* (3); *Maharaja Bir Bikram Kishore Manikya Bahadur v. Chairman, Municipality Comilla* (4); *Choudhury Bibhuti Narayan Singh v. Maharaja Sir Gurus Mahadev Sahi Bahadur* (5); *Harish Chandra Saha v. Pran Nath Chakrabutty* (6); *Kali Charan Naskar v. Ram Kumar Sarkar* (7) referred to.

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Appeal by the Plaintiffs.

Suit for declaration of plaintiffs' right of way over the suit land and for injunction.

The material facts appear from the judgment.

Mr. Panchanan Chaudhuri for the Appellant.

Mr. Jnananath Borah for the Respondent.

C. A. 7.

The following judgment was delivered by

Sharpe, J. :—This appeal arises out of a suit brought by the plaintiffs appellants for declaration of their right of way over the suit land and for removal of an obstruction said to have been caused by the defendants and for an injunction prohibiting future obstruction. The suit was contested by the defendant who denied that there was any path or any right of way over the suit land and contended that the suit was not maintainable. On the pleadings, four issues were framed and issue No. 1 was whether the suit was maintainable in its present form. A commissioner was appointed to hold a local investigation on the prayer of the plaintiffs and, after the submission of his report and various adjournments, the case was fixed for hearing on the 27th of May, 1942. The case was opened and one of the plaintiffs, who were eleven in number, was examined and cross-examined. On the basis of certain admissions made in his cross-examination the learned Munsiff at once held that the disputed path was a public highway and not a village path, that the eleven plaintiffs had not obtained authority from other members of the public for restoration of the way in question and dismissed the suit on the ground that it was not maintainable under section 91 and order 1 rule 8 Civil Procedure Code.

On appeal the learned District Judge affirmed the decision of the trial Court. He discarded the objection of the appellants that

(1) (1941) 46 C. W. N. 261.

(2) A. I. R. (1937) Pat. 54.

(3) A. I. R. (1939) All. 586.

(4) (1935) 39 C. W. N. 590.

(5) (1939) 19 Pat. 208.

(6) (1923) 39 C. L. J. 347.

(7) (1910) 17 C. W. N. 73.

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the Court was wrong in disposing of the suit in this summary fashion without taking the evidence of the witnesses who were present in accordance with the provisions of order 18, rule 4 Civil Procedure Code. He also upheld the view of the lower Court that the admissions of the plaintiff were sufficient for coming to the conclusion that the path was a public way and consequently that the view was correct that section 91 was a bar. In that connection he observed also that it had not been shown that any of the 11 plaintiffs had suffered special damage and that the proper thing was for them to ask for permission to sue afresh if special damages could be proved or to withdraw the suit if special damages could not be proved. He apparently agreed with the contention that order 1, rule 8 Civil Procedure Code was not in itself a bar but he considered that in view of the admissions of the plaintiff it would be idle to remand the case for taking further evidence. In his opinion the fact that no specific objection with regard to these grounds of non-maintainability were taken in the written statement was immaterial. Consequently he dismissed the appeal.

Mr. Chaudhuri, for the appellant has contended that the procedure adopted by the trial Court and confirmed by the appellate Court is erroneous since there had been no compliance with the provisions of order 18, rule 4 Civil Procedure Code and the suit was decided without taking the evidence of the witnesses who were in attendance and which they were prepared to offer. He has maintained further that the views of the Courts below cannot be supported since they relied only on a few isolated passages from the cross-examination of one of the plaintiffs and did not consider his evidence as a whole or the effect of the defendant's denial of the existence of any path or other materials already on the record, such as the report of the commissioner who held a local investigation or the order of the Magistrate who held a local inspection in connection with the application made to him for re-opening of the way in dispute. Mr. Chaudhuri has urged also that both the Courts below have entirely omitted to consider properly whether the path was village path or a public highway within the full sense of that term and whilst not disputing the view taken in *Surendra Kumar Basu v. The District Board of Nadia* (1), that if, in fact, the suit can be held to be one for removal of a public nuisance, proof of special damage will be required, he has claimed

that he is entitled to an opportunity to produce all his evidence to show that the disputed way is only a village path, in which case proof of special damage will not be required and also that he should get an opportunity to prove special damage in case it should be decided on evidence that this suit in fact relates to a "public nuisance". He has pointed out that the defendant did not claim in his written statement that the suit was barred either under section 91 or order 1, rule 8 Civil Procedure Code and has contended that the plaintiffs should not have been taken by surprise but should have been given proper facilities to meet the objections disclosed for the first time in the cross-examination of one of the plaintiffs. He asked therefore that the suit should be remanded to the trial Court for decision after taking evidence of the parties.

For the respondents, Mr. Borah has argued that in view of the admissions of the plaintiff in his cross-examination the view of the lower Courts is correct since it is clear from those admissions that the disputed way is a public one and that all persons interested have not been made parties. He contends that the objections regarding maintainability were sufficiently indicated in the written statement of the defendant and he relies on the decisions in the cases of *Bissessar Pathak v. Harbans Lal* (1); *Mt. Ram Kali v. Munnalal* (2); *Maharaja Bir Bikram Kishore Manikya Bahadur v. Chairman, Municipality Comilla* (3), in support of his claim that section 91 and order 1, rule 8 Civil Procedure Code are attracted and that proof of special damages is necessary. Those decisions are however of no real assistance since they relate to suits in respect of "public nuisance".

In my opinion, the contention of the appellants are substantial and I think they have some legitimate grievance in regard to the manner in which their suit has been tried. I cannot agree with the argument that the defendant in his written statement gave proper notice of the objections that the suit was not maintainable as framed because of the provisions of section 91 and order 1, rule 8 Civil Procedure Code. The objection in the written statement was stated in the usual general terms that the suit could not proceed as it was not framed according to the rules of the Civil Procedure Code. I do not think it can be reasonably inferred from this objection that it related to section 91 or order 1, rule 8

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Sharpe, J.

(1) (1937) A. I. R. Pat. 54.

(2) (1939) A. I. R. All. 586.

(3) (1935) 39 C. W. N. 590.

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Sharpe, J.

Civil Procedure Code more specially as the main case for the defendant was that there was no path at all in existence and no way over which anyone had a right of passage. The argument now advanced that the finding is correct that there was a public road seems entirely inconsistent with this pleading and I am not prepared to accept it. True, it is certainly for the plaintiffs to establish their case but the disposal of the suit after examination of one witness did not, in my opinion, give the plaintiffs an adequate opportunity of so doing. The provisions of order 18, rule 3 appear to have been ignored and the summary disposal of the suit without giving the plaintiff any opportunity of rebutting the objection which was specifically indicated for the first time in the cross-examination of one of the plaintiffs was in my opinion neither fair nor proper.

It must be admitted that the admissions of the plaintiff may prove damaging and it may be that the plaintiffs will ultimately be unable to satisfy the Court by the evidence which they adduced that the path in question is a village path and not a public highway but they should at least be given an opportunity of establishing their case and I do not agree with the view that the Court can summarily override the provisions of order 18, rule 4 Civil Procedure Code and refuse to examine witnesses in attendance. It may be of course that in certain cases preliminary issues may be decided without examination of all or even of any of the witnesses produced, either with the consent of the parties or where it is manifest that their evidence will be irrelevant or unnecessary, but where, as in the present case, a suit is being summarily dismissed on the finding that the path is a public way and that there is no proof of special damage, both substantial questions of fact, the provisions of order 18, rule 4 Civil Procedure Code cannot, in my opinion, be ignored. In this connection I cannot agree either with the view of the lower appellate Court that "in view of the admissions of one of the plaintiffs it would have been idle to have proceeded to examine a number of witnesses. Equally would it be idle to remand the case. The plaint would have to be amended in such a way as to change the character of the suit and witnesses produced after such remand would be studiously instructed to undo the damage caused by this perhaps inadvertent statement of one of the plaintiffs at the present state". It may well be that the plaintiffs will try to avoid or explain the admissions of the plaintiff to further evidence, but this cannot be helped in view of the manner in which the suit was tried, and,

in any case, sufficient attention does not seem to have been paid by the lower Courts to the evidence of the plaintiff as a whole. In that evidence will be found other statements which are not consistent with the view that the way is a public highway. Neither the commissioner's report nor the order of the Magistrate in the application before him nor the settlement records appear, *prima facie*, at least, to support the claim that the path is a public highway and as already noted such a view is quite inconsistent with the defendant's own case.

As stated above, it is not contested that if the obstruction complained of relates to a public highway, in other words, if the suit is for removal of a "public nuisance" then on the authority of the case reported in *Surendra Kumar Basu v. The District Board of Nadia* (1), the plaintiffs will have to establish special damage in order to avoid the bar of section 91 Civil Procedure Code. Mr. Chaudhuri has however relied on the decisions reported in *Mt. Ram Kali v. Munna Lal* (2); *Choudhury Bibhuti Narayan Singh v. Maharaja Sir Guru Mahadeo Sahi Bahadur* (3); *Harish Chandra Saha v. Pran Nath Chakrabutty* (4); *Kali Charan Nashar v. Ram Kumar Sarkar* (5), in support of his contention that in the case of a village pathway no question of special damage arises. No decision of a contrary nature has been cited by Mr. Borah for the respondents. The decision in *Harish Chandra Saha v. Pran Nath Chakrabutty* (4) is clear that "it is only in the case of a public highway that the question of special damage arises; where the case is one of a village path, there is no question of special damage". The decision of *Kali Charan Nashar v. Ram Kumar Sarkar* (5), emphasises that "there is distinction between a public highway and a village path and a suit under section 30 Civil Procedure Code (of the Code of 1882) is maintainable when a right to a village pathway is the subject-matter of litigation even in the absence of special damage". It follows therefore that the question whether the path is a village path or a public highway is a material question of fact to be decided after hearing all available evidence and the summary decision that the way was a public highway and that there was no proof of special damages appears to me to have been improper.

(1) (1941) 46 C. W. N. 261.

(2) (1939) A. I. R. All. 586.

(3) (1935) 19 Pat. 208.

(4) (1923) 39 C. L. J. 347.

(5) (1910) 17 C. W. N. 73.

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Sharp, J.

As regards the omission to comply with the provisions of order 1, rule 8, the lower appellate Court appears to have accepted the view, with which I agree, that this is an enabling section and is not in itself a bar to the suit. I am not prepared to accept the contention that merely because certain other persons joined with the plaintiffs in making an application to the Magistrate they have necessarily the same interest as the plaintiffs. If however there is a defect in this respect it is one which may be remedied even now with the permission of the Court and even if it be not rectified it will not prevent the plaintiffs maintaining a suit in their own right if they have a right to relief independently of other persons having the same interest, though a decision in the absence of those persons will not affect their interest if they are not made parties. In this connection the decision reported in *Mt. Ram Kali v. Munna Lal* (1); *Choudhury Bibhuti Narayan Singh v. Maharaja Sir Guru Mahadev Asram Prasad Sahi Bahadur* (2), may be seen.

It may be noted also that no objection with regard to non-joinder or mis-joinder was taken in the written statement of the defendant and in view of the provisions of order 1, rule 13 Civil Procedure Code, it appears that so far as the defendant No. 1 is concerned, it should be held that any such objection on this ground has been waived.

In my opinion, therefore, this appeal must be allowed. The decrees of the Courts below are set aside. The suit is remanded to the trial Court for proper disposal after giving the parties an opportunity of adducing their evidence in accordance with law. The appellants will get their costs of this Court. Further costs will abide the result of the suit.

S. K. B. ; A. T. M.

Appeal allowed.

(1) (1939) A. I. R. All. 586.

(2) (1939) 19 at. 208.

APPELLATE CIVIL.

Before Mr. Justice G. N. Das.

SRIMATI PARUL BALA GHOSH

v.

SOROJ KUMAR GOSWAMI AND OTHERS.*

CIVIL.

1947.

April, 25.

Contract of sale—Suit for specific performance—Non-payment of full purchase money—Pleading—Continuous readiness and willingness to perform the contract—Transfer of Property Act (IV of 1882), section 53A.

Ordinarily non-payment of full purchase money is not a ground for denying the plaintiff's claim for specific performance of a contract of sale :

Yamshed Khodaram Irani v. Burjorji Dhunjibhai (1) followed.

The plaintiff in a suit for specific performance has to allege, and if the fact is traversed, he is required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing of the suit, to perform the contract on his part :

Ardeskir v. Flora Sassoon (2) referred to.

Central London Property Trust Ltd. v. High Trees House Ltd. (3) distinguished.

The plaintiff in a suit for specific performance of a contract of sale cannot avail himself of the provisions of section 53A of Transfer of Property Act. It is available only to a defendant to protect his possession.

Prebodd Kumar Das v. The Dantmara Tea Co., Ltd. (4) followed.

Mr. Firdos Johan v. Dr. Mohammad Yunus (5) distinguished.

Appeal by the Plaintiff.

Suit for specific performance of a contract of sale of land, and in the alternative for a refund of the sum paid by the plaintiff to defendant No. 1.

*Appeal from Appellate Decree No. 432 of 1943, against the decree of S. Chatterjee Esq., Subordinate Judge of Murshidabad at Berhampur, dated the 16th September, 1942, reversing that of S. P. Chatterjee Esq., Munsiff and Court, Kandi, dated the 23rd July, 1941.

(1) (1915) L. R. 43 I. A. 26 ; L. L. R. 40 Bom. 289-298 ; 23 C. L. J. 358 (365).

(2) (1928) L. R. 55 I. A. 360 ; 48 C. L. J. 451 (467-468, 470).

(3) (1947) 1 K. B. 130.

(4) (1939) 70 C. L. J. 483.

(5) A. I. R. (1940) Oudh 1.

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1947.

Srimati Parul

Bala Ghosh

Soroj Kumar

Goswami.

April, 25.

The material facts are stated in the judgment.

Messrs. Bimala Charan Deb, and Soroj Kumar Chatterjee (for Mr. Tarakeswar Nath Mitra) for the Appellant.

Messrs. Rama Prosad Mookerjee, J. Majumdar and Uma Prosad Mookerjee for the Respondents.

The judgment of the Court was as follows :

G. N. Das, J. :—This appeal is by the plaintiff. The plaintiff instituted the suit out of which this appeal arises, for specific performance of a contract of sale of the disputed land in, the alternative for a refund of the sum paid by the plaintiff to the defendant No. 1.

The plaintiff's case briefly stated, was that the defendant No. 1 entered into a contract to sell the disputed land towards the end of Jaistha 1345 B. S. the agreed price being Rs. 199 which was to be paid by the middle of Sraban 1345. The plaintiff paid on the 26th March, 1345. The defendant No. 1 executed a deed of sale on 6th Sraban 1345, the date and the nature of the ralyati contracted to be sold being left blank. The title deeds were made over to the plaintiff who paid, at the time a further sum of Rs. 95 a sum of Rs. 49 remained due. Out of this, a sum of Rs. 5 was paid during Durgapuja and Rs. 26 during the X'mas vacation in Pous 1345. The remaining sum of Rs. 18 was paid during the Id holidays, Ehs. 4, 4a. Though the entire consideration was paid as above, the defendant No. 1 sold the land to defendants Nos. 2-3 who had knowledge of the contract to sell with the plaintiff ; hence the suit.

The case of defendant No. 1 is that there was a contract of sale but the consideration was Rs. 299 viz., Rs. 199 payable to defendant No. 1 and Rs. 100 as rent and landlord's fee to be paid to the landlord out of which Rs. 50 only was paid on 29th Asarh 1345, the balance was agreed to be paid within the 5th or 6th Sraban 1345 ; in default the sum of Rs. 50 was to be forfeited the defendant executed the Kobala with the blanks as aforesaid and made over the title deeds on that date, but as the plaintiff did not pay the balance of the agreed price on that date the blanks were not filled up and the contract fell through and thereafter the defendant No. 1 sold the disputed land to defendants Nos. 2-3.

Defendants Nos. 2, 3 pleaded that they had purchased the disputed land for Rs. 299 *bona fide* and without knowledge of the plaintiff's contract,

The trial Court refused the plaintiff's prayer for specific performance but directed a refund of Rs. 58 to be made by defendant No. 1 to the plaintiffs with proportionate costs.

The plaintiff preferred an appeal. The lower appellate Court has found that defendant No. 1 agreed to sell the land for Rs. 199 and in addition to pay to the landlord the arrears of rent and landlord's fee; that the plaintiff was entitled to pay the purchase money within a reasonable time; the defendant's story of forfeiture of Rs. 50 in case the balance was not paid was not true; that the plaintiff paid Rs. 50 plus Rs. 100 sent by insured cover and Rs. 18 in Magh 1345 towards arrears of rent, but the plaintiff had not been able to prove the payment of Rs. 5 during Durga Puja and Rs. 26 during X'mas vacation. The lower appellate Court also held that the non-payment of these two sums of Rs. 5 and Rs. 26 and non-payment of rent resulted in non-completion of sale by defendant No. 1 to the plaintiff and the sale to defendants Nos. 2-3. The plaintiff however did not incur a forfeiture of the money paid to defendant No. 1. The defendants Nos. 2-3 were found to have full knowledge of the plaintiff's contract, before their purchase.

The lower appellate court varied the decree of the trial Court so far as defendant No. 1 was concerned, but dismissed the suit with costs against defendants Nos. 2-3.

The plaintiff has preferred this appeal, Mr. Bimalacharan Deb appearing on behalf of the plaintiff argues that a decree for specific performance of the contract should be passed against all the defendants conditional on his paying Rs. 31 which according to him, is the balance of the purchase money due. He also urges that the principles underlying section 53A Transfer of Property Act apply; he relies on 2 affidavits sworn to by Mr. B. K. Ghose Maulik and Mr. N. N. Ghosh, his pleaders in the Courts below as showing that the question of delivery of possession in pursuance of the contract of sale was pressed, and submits that the evidence on record will prove that possession was delivered to the plaintiff as alleged.

As regards the first point raised, Mr. Deb's argument proceeds on a misapprehension. The finding of the lower appellate Court is that in addition to non-payment of a sum of Rs. 31 out of the cash consideration of Rs. 199 the arrears of rent and landlord's fees also remained unpaid by the plaintiff, ordinarily non-payment of the full purchase money is not a ground for denying the plaintiff's claim for specific performance of a contract of sale. In

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the case of *Jamshed Khodaram Irani v. Burjorji Dhunjeebhai* (1) Viscount Haldane observed at page 33 "*Prima facie* equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified". To the same effect are observations of Lord Cairns in *Tilley v. Thomas* (2) "A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if [as Lord Justice Turner said in *Roberts v. Berry* (3)] there is nothing in the 'express stipulations between the parties, which would make it inequitable to interfere with and modify the legal right'. Applying the above principles to the agreement as found by the lower appellate Court it must be held that time was not of the essence of the contract. But there is another insuperable difficulty in the plaintiff's way. As was pointed out by Lord Blanesburgh in *Ardeshr v. Flora Sassoon* (4) the plaintiff in a suit for specific performance had "to allege and if the fact was traversed, he was required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part". It was also observed in that case* that "although so far as the Act is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England (Sec. 24(b) is the nearest), it seems invariably to have been recognised, and on principle, their Lordships think rightly, that the Indian and the English requirements in this matter are the same." In the present case the plaintiff did not allege any willingness to abide by the contract, in fact the terms set out are to some extent different from the contract as proved. The plaintiff disputed the terms of the contract both in the trial Court and in the lower appellate Court. The offer made by Mr. Deb is too late in the day to give the plaintiff the equitable relief of specific performance.

(1) (1915) L. R. 43 I. A. 26; I. L. R. 40 Bom. 289 (298); 23 C. L. J. 358 (365).

(2) (1867) L. R. 3 Ch. 61.

(3) (1833) 3 DeG. M. & G. 284 (289).

(4) (1928) L. R. 55 I. A. 360; 48 C. L. J. 451 (467-68).

* See P. 470 of 48 C. L. J.—Ed.

Mr. Deb relied on the observation of Denning, J. at P. 134 in the case of *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (1) where it is pointed out that "the law has not been standing still since *Jorden v. Money* (2)" and that promise was going to be acted upon by the person to whom it was made and which was in fact acted on, must be honoured. The above observations merely state that promises of the above description are good consideration to support an action based on such a promise. They do not support the proposition that a contract of which full consideration has not been paid or offered to be paid at any time up to the hearing, can be specifically enforced.

I shall now deal with the second point raised. In the case of *Probodh Kumar Das v. The Dantmara Tea Co., Ltd.* (3) Lord Macmillan observed at P. 487 "In their Lordships' opinion the amendment of the law effected by the amendment of section 53A conferred no right of action on a transferee in possession under an unregistered contract of sale. Their Lordships agree with the view expressed by Mr. Justice Mitter in the High Court that 'the right conferred by section 53A is a right available only to the defendant to protect his possession'. The section is so framed as to impose a statutory bar on the transferor ; it confers no active title on the transferee. Indeed, any other reading of it would make a serious inroad on the whole scheme of the Transfer of Property Act."

Mr. Deb relied on the decision of Bennet, J. in the case of *Mr. Firdos Johan v. Dr. Mohammad Yunus* (4) in support of the proposition that section 53A Transfer of Property Act was available to a plaintiff. In that case, the plaintiff had filed a petition under order 21 rule 100 Civil Procedure Code in answer to an execution filed by the defendant decree-holder for possession of the disputed property ; the petition being disallowed a suit under order 21 rule 103 Civil Procedure Code was filed and reliance was placed on section 53A Transfer of Property Act in proof of the plaintiff's claim based on a receipt and on taking of possession on the foot thereof. Mr. Justice Bennet observed that the suit was a continuation of the petition under order 21 rule 100 Civil Procedure Code and could very well be regarded as a defence to the petition for execution which initiated the proceedings and as such

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(1) (1947) 1 K. B. 130.

(2) (1854) 5 H. L. C. 185.

(3) (1939) 70 C. L. J. 483 (487).

(4) A. I. R. (1940) Oudh 1.

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the claim made by the plaintiff was a defensive equity put forward by the plaintiff. It cannot be said that the plaintiff in a suit for specific performance was asserting such an equity, the claim is really an active title set up by the plaintiff. In my opinion, the plaintiff cannot avail himself of the provisions of section 53A Transfer of Property Act.

Both the contentions raised fail.

But it appears that the order portion of the judgment of the lower appellate Court is vague and requires classification. In lieu of the decree of the lower appellate Court, the plaintiff's suit be decreed in part, the claim for specific performance of the contract of sale be disallowed against all the defendants, the plaintiff's prayer for refund of a part of the consideration money be decreed against defendant No. 1 and the defendant No. 1 be directed to pay a sum of Rs. 168 only and half costs of the trial Court and lower appellate Court to the plaintiff. The plaintiff do pay the costs of defendants Nos. 2-3 in the trial Court and the lower appellate Court. There will be no order for costs in this Court.

A. T. M. ; S. K. B.

Appeal dismissed.

Before Mr. Justice G. N. Das.

ASWINI KUMAR DAS (GUPTA)

AND ON HIS DEATH HIS HEIRS AND LEGAL

REPRESENTATIVES

ANIL KUMAR DAS GUPTA AND OTHERS

v.

KARAMAT ALI KHA.*

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1947.

April, 30.

Limitation—Res judicata, principle of—Adjudication—Order for execution—Plea of limitation not put forward—Order directing sale proclamation to issue—Absence of attachment—Absence of notice under order 21 rule 22 of the Code of Civil Procedure (Act V of 1908)—Order for execution under order 21 rule 66 of the Code of Civil Procedure—Entry in order sheet—Evidence of service of notice—Evidence Act (I of 1872), section 35.

Entry in order sheet of service of notice is evidence of fact of service of notice under section 35 of the Indian Evidence Act :

*Appeal from Appellate Order No. 178 of 1945, against the order of S. K. Halder Esq., District Judge of Bakerganj, dated the 23rd March, 1945, reversing the order of J. S. Sarkar Esq., Munsiff, and Court, Barisal, dated the 31st August, 1944.

Gaibandha Loan Office Ltd. v. Musammat Saigadunnissa Khatun (1) followed.

The appellant obtained a final decree in a mortgage suit on 6th September, 1938. He started execution proceeding on 7th September, 1942. Notice under order 21 rule 22 of the Code of Civil Procedure was directed to be issued and it appeared from order sheet dated the 7th January, 1943 that the notice under order 21 rule 22 Civil Procedure Code had been served prior to that date :

Held, that the Court in passing its order on the 7th January, 1943 was of opinion that the decree was executable and further process in execution might be taken. The order necessarily implied an adjudication that the decree at the time was capable of execution :

Murlidhar Subul v. Nurahing Das (2) followed.

Beldya Nath Sil v. Bejoy Chandra Kundu (3) distinguished and dissented from.

Bholanath Dass v. Prafulla Nath Kundu (4) dissented from.

Sureswar Prasad Dhabat v. Maharaj Bahadur Sinha (5) distinguished.

That the order dated the 7th January, 1943 stood unchallenged and was not set aside by the judgment-debtor. The fact that the execution case was dismissed for default at a later stage did not matter :

Kamini Debi v. Aghore Nath Mukherji (6) followed.

That the judgment-debtor was precluded by the order dated the 7th January, 1943 from raising the bar of limitation in subsequent execution case on the ground that the previous execution case was filed beyond time.

That an order passed in subsequent execution proceeding directing sale proclamation to issue proceeded on an implied adjudication that the decree was executable and precluded the judgment-debtor from raising the bar of limitation in the subsequent execution proceeding.

The absence of an attachment was not material in determining the question whether or not the order previously made directing the execution to proceed, involved an adjudication that the decree was executable :

Murlidhar Subul v. Nurahing Das (2) and *Maharaja Bir Bikram Kishore Manikya Bahadur v. Khalilur Rahman* (7) followed.

Absence of notice under order 21 rule 22 of the Code of Civil Procedure did not bar the subsequent execution. Notice under order 21 rule 66 of the Code of Civil Procedure could be issued without serving any notice under order 21 rule 22 of the said Code.

(1) (1942) 76 C. L. J. 17 ; 46 C. W. N. 967.

(2) (1911) 17 C. W. N. 113 (115).

(3) (1935) 39 C. W. N. 583.

(4) (1900) I. L. R. 28 Calc. 122.

(5) (1937) 41 C. W. N. 1151.

(6) (1909) 11 C. L. J. 91 ; 14 C. W. N. 357.

(7) (1935) 39 C. W. N. 1206 (1209).

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1974.

Aswini Kumar

Das Gupta

v.
Karamat Ali Kha.

CIVIL.

1947.

Aswinil Kumar
Das Guptav.
Karamat Ali Kha.

Appeal by the Decree-holders.

Application for execution of mortgage decree.

The material facts are stated in the judgment.

Mr. Jitendra Nath Guha for the Appellant.*Meisrs. Hem Chandra Dhar (for Mr. Panchanon Ghosh) and
Sukumar Ghosh (Jr.)* for the Respondent.

The judgment of the Court was as follows:

April, 30.

G. N. Das, J.:—This appeal is on behalf of the decree-holder. The appellant obtained a final decree in a mortgage suit on the 6th of September, 1938. On an allegation that the judgment-debtor had paid a sum of Rs. 7 towards the decree the appellant started execution proceedings on the 7th of September, 1942. Notice under order 21 rule 22 of the Code of Civil Procedure was directed to be issued and it appears from order No. 11 dated the 7th of January, 1943 that the notice under order 21 rule 22 of the Code of Civil Procedure had been served prior to that date. The Court directed the decree-holder to file the costs and necessary processes by the 14th of January, 1943. The judgment-debtor did not appear on that date in pursuance of the notice under order 21 rule 22 of the Code of Civil Procedure. On the 14th of January, 1943 the judgment-debtor appeared and prayed for time to file objections to the execution of the decree. On his prayer time was allowed till the 21st of January, 1943. On that date neither the decree-holder nor the judgment-debtor appeared. The judgment-debtor did not file any petition of objection for which time was granted to him. As the decree-holder did not appear to take further steps the execution case was dismissed for default on the 21st of January, 1943. Two days later on the 23rd of January, 1943 the judgment-debtor filed a petition of objection to the execution of the decree but this petition was not entertained as the execution case had already been disposed of. On the 18th of January, 1944 the decree-holder filed another petition for execution of the decree. The order recorded on that date is to the following effect. "Application filed on the 18th of January, 1944. Enter in RO 5 and put on the 22nd of January, 1944 for orders. Decree-holder to file all requisites and fill up columns 3 and 8 correctly in the meantime". The execution case was registered as execution case No. 8 of 1944. On the next day costs etc. were filed but certified copy of the satisfaction petition was not filed on that date. The Court directed the decree-holder to remove the defects of the application by the 28th of January,

1944. On that date the case was adjourned to the 5th of February, 1944 on the decree-holder's prayer to take necessary steps. On the 5th of February, 1944 the defects were recorded to have been removed but the case was adjourned in order that the decree-holder may call for the records of the earlier execution case. After certain intermediate orders it appears that on the 29th of February, 1944 the records of the previous execution case were received. The case was to be put up for further orders on the next day which was the 30th March, 1944. The Court directed the issue of notice upon the judgment-debtor to show cause by the 30th of March, 1944 if the payment as alleged by the decree-holder and mentioned in column 5 of the execution petition was true or not. This notice is on the records of this case and it appears that no steps were taken by the decree-holder to have the notice served. On the next date, i. e. the 30th of March, 1944 the decree-holder filed a petition stating that service of notice under order 21 rule 22 of the Code of Civil Procedure was not necessary. By order No. 8 passed on the same date the Court held that there was no necessity for issuing notice under order 21 rule 22 of the Code of Civil Procedure. The order then proceeded to say "Cost and process put in. Issue notice under order 21 rule 66 of the Code of Civil Procedure fixing the 2nd of May, 1944 next for return". On the 2nd May, 1944 the Court recorded following order:—"Notice served. The decree-holder files a process fee Rs. 1 only. It appears that the decree-holder did not file any petition under order 12 which is required under the rules. Put up on the 12th of May, 1944 for further orders. The decree-holder to remove all defects and to put in all requisites by this time with a petition showing the cause of delay". On the 12th of May, 1944 the Court directed that the decree-holder do issue registered card on the judgment-debtor to show cause why the execution case shall not proceed as against them as not time barred. "To 27th of May, 1944 for return and order. The decree-holder do send the card in the meantime". On the next day, the 27th of May, 1944 the judgment-debtor prayed for time to file objection in this case. The case was adjourned to 6th of June for filing objection and vakalatnama. On the 6th of June, 1944 the order as recorded is this:—"If appears that no objection has been filed. Issue sale proclamation under order 21 rule 66 of the Code of Civil Procedure and fix the 7th of August, 1944 for sale at 12 noon. Sale notice to be advertised in the local newspaper, Nashipur-nibashi". On the 7th of June, 1944 the order recorded was to

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the following effect :—"It appears that claim and cost of the suit have not been noted in the execution application by decree-holder. The suit Register has been sent to Dacca. Let it be filled up with reference to the decree (illegible)". On the 28th of June, 1944 the respondent judgment-debtor filed a petition of objection under section 47 of the Code of Civil Procedure.

This objection was registered as Miscellaneous Case No. 369 of 1944. The objections were disallowed by the trial Court the execution petition being held to be not barred by limitation. On an appeal being taken by the judgment-debtor the lower appellate Court has reversed the order of the trial Court and has held that the present execution is barred by limitation. The lower appellate Court was of opinion that the judgment-debtor was not precluded from raising the plea of limitation either because of the orders passed in the first execution case or of the orders recorded in the present execution case. Against this decision the decree-holder has raised this appeal.

Mr. Guha appearing on his behalf has argued that the judgment-debtor is precluded from raising the plea of limitation either because of the orders passed in the first execution case or of the orders recorded in the present execution case. Against this decision the decree-holder has raised this appeal.

Mr. Guha appearing on his behalf has argued that the judgment-debtor is precluded from raising the plea of limitation by reason of principles analogous to *res judicata*. His contention is that the order passed on the 7th of January, 1943 was an adjudication, that the decree was capable of execution on that date as this order has stood unchallenged either by way of review or by way of an appeal against that order the judgment debtor is disentitled from saying that the first petition for execution was beyond time. In my opinion this contention is correct and must be given effect to. The order of the 7th of January, 1943 was passed after a notice under order 21 rule 22 Civil Procedure Code had been served on the judgment-debtor calling upon him to show cause why the decree should not be executed against him. The judgment-debtor did not appear in pursuance of that notice and the Court directed the decree-holder to take further steps in execution of the decree and directed him to file the process and costs. It may be pointed out that although in the petition of objection filed by the judgment-debtor it was generally stated that all processes had been suppressed the judgment-debtor did not examine himself or adduce any evidence in support of his plea, as it appears from No. 23 dated

the 30th of August, 1944 which is to the effect that "neither party examined any witness". The entry in the order sheet is, as has been held in the case of *Gaibandha Loan Office v. Musammât Satiyadunnessa Khatun* (1), evidence under section 35 of the Indian Evidence Act of proof of service. It must therefore, be held that notice under order 21 rule 22 Civil Procedure Code was served in this case. In this view it must be taken that the Court in passing its order on the 7th of January, 1943 was of opinion that the decree was executable and further process in execution might be taken in execution of the decree. The order necessarily implied an adjudication that the decree at the time was capable of execution. This view is supported by the decision in *Murlidhar Sukul v. Nursing Das* (2) on which reliance has been placed by Mr. Guha appearing on behalf of the appellant. The order dated the 7th of January, 1943 stands unchallenged and has not been set aside by the judgment-debtor; the fact that the execution case was dismissed for default at a later stage does not, in my opinion, matter. (See *Kamini Debi v. Aghore Nath Mukherje* (3). Mr. Guha has relied on several other decisions of this Court in which the same view has been taken. Two of the cases, namely, the case of *Lalit Mohan Roy v. Sarat Chandra Roy* (4) and the case of *Promatha Nath Daw v. Habu Mia* (5) re-affirm the principle enunciated in the case of *Murlidhar Sukul* (2) referred to above.

Mr. Dhar appearing on behalf of the respondent has relied on the decision in *Boidya Nath Sil v. Bejoy Chandra Kundu* (6). In that case on the 13th of May, 1933 the executing Court after service of notice under order 21 rule 22 Civil Procedure Code had been effected, recorded the following order:—"No objection by the judgment-debtor. Issue notice under order 21. rule 66 Civil Procedure Code fixing the 10th of June, 1933". On the 10th of June, 1933 the judgment-debtor appeared and filed an objection *inter alia* on the ground of limitation. Mr. Justice M. C. Ghose with whom Mr. Justice Costello concurred was of opinion that the petition of objection filed on the 10th of June, 1943 may be recorded either as a review of the order dated the 13th May, 1933 or as an appeal from that order. With all respect to the learned

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(1) (1942) 76 C. L. J. 17; 46 C. W. N. 967.

(2) (1909) 17 C. W. N. 113 (115).

(3) (1909) 11 C. L. J. 1.

(4) (1932) 37 C. W. N. 752.

(5) (1945) 49 C. W. N. 260.

(6) (1934) 39 C. W. N. 583.

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Judges it seems to me that the petition of objection filed by the judgment-debtor before the same Court cannot be regarded as an appeal from the order of that Court; nor was the application filed was an application for review as such and the grounds taken were not good ground for review. It appears, however, that in the case the judgment-debtor in his petition of objection had challenged the service of notice under order 21 rule 22 Civil Procedure Code and the decree-holder did not controvert the allegation. It may be taken, therefore that the order of the 13th of May, 1933 was not an order which was made after due service of notice under order 21 rule 22 Civil Procedure Code and could not be regarded as an adjudication binding on the judgment-debtor who had no notice of the order of the Court calling upon him to show cause why the decree should not be executed. The general observations made in that judgment must be read in the light of findings arrived at in that case. The observations made in that case were really in the nature of *obiter dicta*, having regard to the finding on the question of notice under order 21 rule 22 Civil Procedure Code. Mr. Dhar relied on a decision in the case of *Bhola Nath Dass v. Prasulla Nath Kundu Chowdhry* (1). In that case, this Court held that although notice under order 21 rule 22 Civil Procedure Code had been served and time given on various occasions to the judgment-debtor, the judgment-debtor could raise the plea of limitation, at a later stage. This decision, in my opinion, runs counter to the above decisions of this Court on which reliance has been placed by Mr. Guha and is opposed to the decision of the Judicial Committee in the case of *Raja of Ramnad v. Velusami Tevar* (2). In that case the executing decree-holder claiming to be an assignee of the decree had started the execution. By an order dated the 13th of December, 1915 the executing Court recorded the assignment and directed further execution to proceed. Later on the judgment-debtor raised an objection on the score of limitation which was given effect to by the lower Court. The Judicial Committee overruled this view and observed that the order of the 13th of December, 1915 must be taken to be a positive order that the decree-holder was entitled to execute the decree and the order not having been challenged on appeal, precluded the judgment-debtor from raising the bar of limitation at a later stage of the same execution proceeding. Mr. Dhar also relied on

(1) (1900) I. L. R. 28 Cal. 122.

(2) (1920) L. R. 48 I. A. 45; 33 C. L. J. 218.

a decision of this Court in the case of *Sureswar Prosad Bhakat v. Maharaj Bahadur Sinha* (1). In that case, however, the fact was that the notice under order 21 rule 22 Civil Procedure Code was directed to be issued and on the next day the decree-holder not having taken any step the execution case was dismissed for default. It cannot be said that the order relied on by the decree-holder was an implied adjudication that the execution proceeding was to go on. In my opinion, therefore, the judgment-debtor is precluded by the order dated the 7th of January, 1943 from raising the bar of limitation in the present execution case on the ground that the first execution case was filed beyond time. In this view it is unnecessary to discuss the effect of the proceedings in the second execution case, i. e., execution case No. 8 of 1944. In my opinion the order passed on the 6th of June, 1944 directing sale-proclamation to issue also proceeded on an implied adjudication that the decree was executable and precluded the judgment-debtor from raising the bar of limitation in the present execution case.

Mr. Dhar has argued that in order that the principle enunciated in the case of *Mungal Pershad Ditchit v. Girija Kanta Lahiri Chowdhury* (2), may apply, it must be proved that the order directing execution to issue had been acted upon by the Court refers to the fact that in *Mungal Pershad's* case (2) there was an attachment effected at the instance of the decree-holder. The question whether it is necessary that the order should be followed by an attachment in execution was considered by this Court in the case of *Murlidhar Sukul v. Nursingh Das* (3). It was pointed out in that case that the absence of attachment was not material in determining the question whether or not the order previously made directing execution to proceed, involved an adjudication that the decree was executable. To the same effect, is the decision in *Maharaja Bir Bikram Kishore Manikya Bahadur v. Khatilur Rahman* (4).

Mr. Dhar also submitted that in the present case the Court was not right in holding that notice under order 21 rule 22 Civil Procedure Code was not necessary. In my opinion, the last order made in the previous execution case must be taken to have been passed on the 21st of January, 1943, on which date the previous

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(1) (1937) 41 C. W. N. 1151.

(2) (1881) L. R. 8 I. A. 123 ; I. L. R. 8 Calo. 51 ; 11 C. L. R. 113.

(3) (1909) 17 C. W. N. 113 (116).

(4) (1934) 39 C. W. N. 1206 (1209).

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execution case was dismissed for default. The present execution case was started on the 18th of January, 1944 which is within one year of the last order passed in the previous execution case. Moreover, in view of the amendments made by this Court in order 21 rule 22 and order 21 rule 90 Civil Procedure Code the absence of notice under order 21 rule 22 Civil Procedure Code does not bar the present execution.

The result, therefore, is that this appeal is allowed, the order of Court below is set aside and the order of the Munsiff restored with costs throughout.

The costs of this appeal which has been heard on two different dates are assessed at five gold mohurs.

Leave to prefer an appeal under clause 15 of the Letters Patent prayed for is refused.

A. T. M. ; S. K. B.

Appeal allowed.

CRIMINAL REVISION.

Before Mr. Justice A. N. Sen.

CRIMINAL.

SATKARI GHOSE

v.

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 April, 30.

RAM LAKSHMAN DUTTA.*

Code of Criminal Procedure (Act V of 1898), section 4(h)—A person lodging information of theft—Found false by police—Notice to show cause why he should not be prosecuted under section 211 of the Indian Penal Code (Act XLV of 1860)—“Naraji” petition filed by him, if a complaint within section 4(h)—Magistrate finds that prima facie case for prosecution has been made out, issues summons and observes that “This also disposes of the ‘naraji’ petition”—If a proper order of dismissal of “naraji” petition under section 203 of Code of Criminal Procedure—Sections 190 (1) (b), 195 (1) (b) where applicable—Complaint for prosecution not made in writing by the Court where the “naraji” petition was filed—If a mere technical error.

Where a person is served with a notice to show cause why he should not be prosecuted for lodging a false case (an offence under section 211 of the Indian Penal Code) and he files a “naraji” petition, this “naraji” petition should be treated as a complaint within the meaning of section 4(h) of the Criminal Procedure Code and the trying Magistrate should dispose it of in accordance with the provisions of the Criminal Procedure Code.

*Criminal Revision Case No. 245 of 1947 against the order of Sessions Judge of Burdwan, affirming that of the District Magistrate of Burdwan.

Where the Magistrate after examining the witnesses of the petitioner finds that a prima facie case for prosecution has been made out, issues summons and observes that "This also disposes of the naraji petition":

Held, that it was not a proper order of dismissal as under section 203 of the Code he should have recorded his reasons in brief.

The provisions of section 195 (1) (b) of the Code of Criminal Procedure apply to a case arising out of a petition of complaint whereas those of section 190 (1) (b) of the Code apply where no petition of complaint is filed; but as soon as section 195 (1) (b) comes into operation there must be a complaint in writing by the Court in which the petition of complaint was lodged or by some other Court to which such Court is subordinate, the default of which is not a mere technical error as otherwise the petitioner would have had a remedy by way of appeal under section 476 B of the Code.

Tayebul'a v. Emperor (1) referred to

Application for Revision under section 439 of the Code of Criminal Procedure by the Complainant.

The material facts appear from the judgment.

Messrs. Bireswar Chatterjee and Parimal Mukherjee for the Petitioner.

Mr. Serajuddin Ahmed for the Crown.

The following judgment was delivered:

Sen, J. :—After hearing the learned Advocate for the petitioner and the learned Advocate for the Crown I am of opinion that this Rule must be made absolute. The facts briefly are as follows: On the 15th of September, 1946 the petitioner lodged an information at the Memari Police Station in the District of Burdwan charging one Ram Lakshman Dutt with the theft of a goat from his house. It is alleged that the goat was being taken away by Ram Lakshman Dutt at about 12-30 A.M. The police investigated the case and made a final report stating that the case was false and praying that the petitioner may be prosecuted for lodging a false case and thereby committing an offence punishable under section 211 of the Indian Penal Code. Upon this the petitioner filed what is known as a "naraji" petition impugning the correctness of the police report and stating that his case was true. The learned Magistrate had previous to this issued a notice on the petitioner to show cause why he should not be prosecuted for having committed an offence punishable under section 211 of the Indian Penal Code and it was in answer to this notice that the petitioner filed his "naraji" petition. The Magistrate thereafter

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examined five witnesses produced by the petitioner and on the 6th of December, 1946 he passed orders—In his order he says that he is of opinion that the information given by the petitioner is “improbable and false” and that a *prima facie* case for a prosecution for an offence punishable under section 211 of the Indian Penal Code had been made out against the petitioner; thereupon he decided to try the petitioner for this offence and summoned the petitioner. As regards the “naraji” petition the learned Magistrate makes the following observation. “This also disposes of the “naraji” petition. Against this order the petitioner moved the Sessions Judge who rejected the motion and passed an order which discloses that the learned Judge had taken no trouble whatsoever to investigate the law and the different sections of the Code of Criminal Procedure which have been violated. I would point out to the learned Sessions Judge that in criminal matters he should be careful to see that there has been a strict compliance with the law; criminal cases should not be disposed of in the rough and ready manner which the learned Judge seems to have adopted. .

It has been well established by a long series of decisions that a “naraji” petition is a complaint within the meaning of section 4(h) of the Code of Criminal Procedure. Thus there was before the learned Magistrate a petition of complaint by the petitioner charging Ram Lakshman Dutt with theft. That petition of complaint had to be disposed of in accordance with the provisions of the Code of Criminal Procedure. The learned Magistrate could have issued summons on the petition of complaint against Ram Lakshman Dutt and proceeded to try him. If he had any suspicion regarding the truth of the complaint and he considered that there should be a postponement of the issue of process against the person complained against the learned Magistrate could have adopted one or other of the methods prescribed in section 202 of the Code of Criminal Procedure. Apparently the learned Magistrate wished to proceed under section 202 of the Code of Criminal Procedure inasmuch as he examined witnesses produced by the complainant before deciding whether or not process should issue; but he did not comply fully with the provisions of that section which says that he should record his reasons for postponing the issue of process. This however is not the only error committed by the learned Magistrate. There are other and more serious errors.

After examining the witnesses for the complainant there were two courses open to the learned Magistrate. He could have

dismissed the complaint under section 203 of the Code of Criminal Procedure if he was of opinion that there were not sufficient grounds for proceeding with the case. In the latter case he should briefly record his reasons for dismissing the complaint. The learned Magistrate has not even dismissed the complaint. All he has said is this :—"This also disposes of the "naraji" petition. The learned Magistrate would have done well to have studied the Code of Criminal Procedure and proceeded in accordance therewith instead of inventing a procedure of his own. If the learned Magistrate had dealt properly with the matter and if he had dismissed the petitioner's complaint the petitioner would have had a remedy. He could have moved against the order of dismissal. He has been deprived of that remedy by an order which does not dismiss the complaint.

The next difficulty in the way of the Crown is this. As the matter was before the Court upon a complaint the provisions of section 195 (1) (b) of the Code of Criminal Procedure would at once be attracted. Section 195 (1) (b) of the Code of Criminal Procedure says, *inter alia*, that no Court shall take cognizance of any offence punishable under section 211 of the Indian Penal Code when such defence is alleged to have been committed in or in relation to any proceeding in any Court except on the complaint in writing of such Court or of some other Court to which such Court is subordinate. If the case of the petitioner was false he would be guilty of an offence punishable under section 211 of the Indian Penal Code but the offence would be one which had been committed in a proceeding in Court because the offence was committed when the false complaint was lodged in Court. Had there been no naraji petition or complaint then section 195 (1) (b) of the Code of Criminal Procedure would have had no operation. The Court could have taken cognizance of the case against the petitioner in accordance with the provisions of section 190(1) (b) of the Code of Criminal Procedure. But once there has been a petition of complaint in Court section 195 (1) (b) of the Code of Criminal Procedure comes into operation and there must be a complaint in writing by the Court in which the complaint was lodged or by some other Court to which such Court was subordinate. In this connection I would refer to the case of *Tayebulla v. Emperor* (1). This is not mere technical error. If the learned Magistrate had made a complaint in writing in accordance with the provisions

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(1) (1916) I. L. R. 43 Cal. 1152 ; 24 C. L. J. 134.

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of section 195 (1) (b) of the Code of Criminal Procedure, as he was bound to do, the petitioner would have had a remedy by way of appeal under section 476B of the Code of Criminal Procedure. In the present case this right of appeal has been denied to the petitioner by reason of the procedure adopted by the learned Magistrate.

Having regard to all these circumstances I set aside the order passed by the learned Magistrate and direct him to deal with the *naraji* petition as if it were a petition of complaint and to proceed in accordance with the provisions of section 200 of the Code of Criminal Procedure and the following sections. After he has disposed of the complaint in accordance with the provisions of law, the learned Magistrate may take such steps as he thinks proper in accordance with the provisions of the Code of Criminal Procedure adverted to above and in the light of the observations made above.

S. K. B. ; S. C.

Rule made absolute.

APPELLATE CIVIL.

*Before Mr. Justice B. K. Mukherjee and Mr. Justice
E. B. Ormond.*

DEBABRATA MUKHERJEE

v.

SATISH CHANDRA BANERJEE.*

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May, 28.

Mortgage decree—Instalment decree—Application for extension of time for payment of instalment—Bengal Money Lenders Act (X B. C. of 1940), section 34 (1) (a) (H).

Held, when a mortgage decree, payable in instalments, is passed under the provision of section 34 (1) (a) (H) of the Bengal Money Lenders Act and when a default has been made in payment of a particular instalment, in view of the first proviso to section 34 (1) (a) (H) the Court has no power to extend the time for payment of the particular instalment but at most the Court can extend the time for payment of the entire amount of the decree, which on such a default in payment of a particular instalment, becomes due at once and the decree-holder becomes immediately entitled to apply for a final decree.

*Appeal from Original Order No. 17 of 1944, against the order of A. G. Chatterjee, Esqr., Subordinate Judge, and Court of Howrah, dated the 28th September, 1943.

But having regard to the provisions of the second proviso to section 34(1) a(ii) the judgment-debtor can prevent the passing of the final decree by paying into Court only the instalment in default.

Premotha Nath Sanjal v. Sailesh Chandra Choudhury (1) referred to.

A preliminary decree was passed under order 34 rule 2 of the Code of Civil Procedure read with section 34 (1) (a) (i) and (ii) of the Bengal Money Lenders Act and the principal money together with interest and costs was directed to be paid in 6 annual instalments. The first instalment was to be paid within November, 1941, while the other 5 instalments were payable within November every year for five successive years. The judgment-debtor after paying certain amount out of the first instalment made an application for extension of time to pay the balance. The Court granted the application; the balance of the first instalment was paid within the extended time.

Subsequently, when the time for paying the second instalment was nearing its end, the judgment-debtor applied for extension of time to pay the second instalment. It was stated in the application that he had entered into a contract for sale of the mortgaged property with A and the purchase price would enable the judgment-debtor to pay the entire mortgage money all at once :

Held, that the Court could extend the time for payment of the whole amount.

That an order to the effect that if entire amount was not paid, the second instalment should be held to be in default and the judgment-debtor was not entitled to save one Kist only by payment of Kist, was erroneous.

Appeal by the Judgment-debtor.

Application under sections 47 and 151 of the Code of Civil Procedure.

The material facts appear from the judgment of Mukherjee, J.

Messrs. Jajneswar Majumdar and Surendra Mohan Das for the Appellant.

Mr. Ranjit Kumar Banerjee for the Respondent.

The judgments of the Court were as follows :

Mukherjee, J. :—This appeal is on behalf of the judgment-debtor and is directed against an order of Mr. A. G. Chatterjee, Subordinate Judge, Second Court, Howrah, dated the 28th September, 1943, made on an application presented by the appellant under sections 47 and 151 of the Code of Civil Procedure.

To appreciate the points in controversy between the parties, it would be necessary to state certain earlier facts : On the 15th April, 1943, the appellant Debabrata Mukherjee took an advance of Rs. 3000 from two persons, viz., Bhulidhone Mukherjee and Bejoy Gopal Mukherjee, on a mortgage of his one-sixth share in the joint family property. The mortgage was in form of a condi-

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tional sale carrying interest at the rate of 12 per cent. per annum. Some time afterwards, Debabrata created a second mortgage in respect of the same property in favour of one Susil Kumar Mukherjee. On the 11th December, 1940, Bhulidhone and Bejoy Gopal instituted a suit against Debabrata in the Court of the Second Subordinate Judge, Howrah, to enforce their mortgage bond, and the second mortgagee was made a party defendant to the suit. On the 25th June, 1941, a preliminary decree was passed under Order XXXIV, Rule 2 of the Code of Civil Procedure read with section 34 (1) (a) (i) and (ii) of the Bengal Money Lenders Act, and the principal money together with interest and costs aggregating to Rs. 5440 was directed to be paid in six annual instalments. The first instalment was for Rs. 500 only was to be paid within November, 1941, while the other five instalments were for Rs. 988 each and were payable within November every year for five successive years. On the 29th November, 1941, the judgment-debtor paid Rs. 250 out of the first instalment, and made an application for extension of time to pay the balance. This application was registered as Miscellaneous Case No. 94 of 1941. On the 31st January, 1942, the Court made an order granting extension of time till the 30th June, 1942. Further extension of time was granted by subsequent orders of the Court, and eventually the balance of the first instalment was paid on the 29th July, 1942.

On the 28th November, 1942, when the time for paying the second instalment was nearing its end, the judgment-debtor applied for extension of time to pay the second instalment. It was stated in the application that he had entered into a contract with one Abani Mukherjee for sale of the mortgaged property with the exception of the basti portion, for a consideration of Rs. 8000 and that the conveyance was to be executed on or before the 30th January, 1943. This, it was said, would enable the judgment-debtor to pay the entire mortgage money all at once without the necessity of paying it in instalments. Upon this the Court made the following order on the 30th November, 1942.

"Judgment-debtor wants to pay entire amount. I am prepared to extend time up to the 1st February, 1943, for payment of the whole amount. If entire amount be not paid, the second instalment shall be held to be in default and judgment-debtor shall not be entitled to save one Kist only by payment of Kist".

It may be stated here that neither the parties nor the Court appreciated correctly the provision of law as laid down in the Provisions to section 34 (1) (a) (ii) of the Bengal Money Lenders Act.

As has been held by a Division Bench of this Court in the case of *Promotha Nath Sanyal v. Sailesh Chandru Choudhury* (1), when a default has occurred in the payment of one instalment payable under a mortgage decree passed under section 34 (1) (a) (i) of the Bengal Money Lenders Act, the Court has no power under the first proviso to section 34 (1) (a) (ii) to grant an extension of time in respect of the particular instalment in default. The first proviso only empowers the Court to allow extension of time for payment of the whole amount which on such default becomes payable by the operation of section 34 (1) (a) (ii) of the Act. On such default occurring, the decree-holder becomes immediately entitled to apply for a final decree, but the second proviso allows the judgment-debtor to prevent the passing of such decree by paying into Court, only the instalment in default. The position, therefore, is that the first part of the order recorded by the Court on the 30th November, 1942, by which extension of time was allowed for payment of the whole money up-till the 1st February, 1943, was perfectly right, but the last portion which purported to take away from the judgment-debtor the right given to him by the second proviso mentioned above was erroneous.

It appears that the judgment-debtor made bona fide efforts to pay the entire amount due under the mortgage decree. On the 1st February, 1943, he paid Rs. 1000 and another sum of Rs. 1000 was paid only seven days later on the 8th February, 1943. On the 16th February, 1943, a further sum of Rs. 500 was paid, and on that day a petition was put in on behalf of the judgment-debtor and the decree-holders jointly wherein it was stated that the balance of the decretal dues would be paid within one week from the date of the judgment-debt, failing which the final decree might be passed, and the judgment-debtor further agreed to waive any notice that might be necessary under the Bengal Money-Lenders Act prior to the making of the decree final. Upon this, the Court made the following order :—

"Defendant files a petition praying for further extension of week's time to pay the balance due. The plaintiff has no objection to the defendant's prayer. Time is extended to 24th February, 1943, for making payments."

On the 23rd February, 1943, the original decree-holders assigned their decree to the present respondent Satish Chandra Banerjee, and Satish was substituted in the place of his assignors

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on that very day. Unfortunately, the judgment-debtor could not pay the balance of the decretal dues within the specified time, and on the 26th March, 1943 the final decree was passed. On the 27th April, 1943, the assignee decree-holder put the decree for foreclosure into execution. Objections were raised by the judgment-debtor to delivery of possession of the property, but this petition it seems, was rejected on the ground that symbolical possession was already taken. Eventually, the judgment-debtor put in an application before the executing Court under sections 47 and 151 of the Code of Civil Procedure out of which the present appeal has arisen.

The application if we may say so, was the last and desperate attempt on the part of the judgment-debtor to stop the execution of the final decree for foreclosure. It seems, however, that the judgment-debtor was not properly advised in the matter. The application is long and verbose, and contains many allegations which are either irrelevant or of such a character as could not be entertained by an executing Court. The applicant was also not sure of the relief which he wanted. At one place, it was alleged that no final decree ought to have been drawn up; in another place, it was stated that the decree was *pro tanto* discharged; and in any event, the judgment-debtor was entitled to a refund of the amounts paid. In the prayer clause, however, the only prayer made was that the application for delivery of possession of the property might be dismissed. We have no hesitation in saying that the judgment-debtor, or rather his legal adviser, thoroughly misconceived the remedy, and the executing Court was powerless to give any of the reliefs claimed. An executing Court can certainly refuse to execute the decree when on the face of it, the decree was passed by a Court which had no jurisdiction either pecuniary territorial or personal, but there was not the slightest allegation of any such ground in the petition which was presented by the judgment-debtor.

The only substantial point in favour of the judgment-debtor is that on the 26th March, 1943, when the final decree was drawn up, the instalments already due under the decree had been long paid off by him. No final decree therefore could be passed in view of the provision of the second proviso to section 34 (1) (a) (ii). The Court indeed could not grant extension of time for the purpose of paying any particular instalment, but, as pointed out above, it was open to the judgment-debtor to prevent the passing of the final decree by paying the defaulted instalment only before the final

decree was actually passed. This fact was stated only incidentally in paragraph 8 of the petition, and curiously enough, it was not put forward as a legal objection to the validity of the decree. As we have said already, the judgment-debtor misconceived his remedy, and erred altogether in approaching the executing Court which was powerless to give him any relief. He could have filed an appeal against the final decree, or if there was an apparent error on the part of the Court in overlooking the second proviso to section 34 (1) (a) (ii) of the Bengal Money Lenders Act when the final decree was passed, this could have been brought to the notice of the Court which made the decree by an application for review, or even by an application under section 151 of the Code of Civil Procedure.

In the present case we are informed that the executing Court is the very Court which passed the decree, and the application purports to be one under section 151 of the Code of Civil Procedure and contains the allegations appropriate to the purpose mentioned above. We think that in the interests of justice, an opportunity should be given to the appellant to have the matter considered by the Subordinate Judge not as an executing Court, but as the Court which passed the decree. We hold, therefore, that the order of dismissal made by the Subordinate Judge under section 47 of the Code of Civil Procedure should stand, but it would stand on the ground that it was beyond the competency of the executing Court to enquire into these matters. We direct the Subordinate Judge to entertain the petition as the Court passing the decree, and consider only one point, viz, whether in drawing up the final decree in the mortgage suit, the Court overlooked the second proviso to section 34 (1) (a) (ii) of the Bengal Money Lenders Act. If the Court decides in favour of the petitioner, it will set aside the final decree, and the further proceedings will be regulated by the provisions of the Bengal Money Lenders Act. If the Court finds against the petitioner, the order of dismissal will stand.

The result, therefore, is that the appeal is dismissed but the application filed by the appellant is sent back to be heard and considered by the Subordinate Judge as the Court passing the decree in accordance with the directions given above.

We make no order as to costs in this Court.

Ormond, J. :—I agree.

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*Appeal dismissed ;
Application sent back.*

APPELLATE CRIMINAL.

Before Mr. Justice T. J. Y. Roxburgh and Mr. Justice
P. B. Chakravarti.

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THE EMPEROR.*

Mens Rea—Indian Companies Act (VII of 1913), section 282—Elements necessary for constituting the offence under—Mens rea, if an essential element—Section 132(1)—Nature and value of assets and liabilities—Appendix, Form F—Secured and unsecured loans, nature of—Loan advanced to company by its director on an agreement to mortgage, if a secured loan—Anomalous character of loan (i. e. whether secured or unsecured) not secured by formal deed of mortgage but entered in Balance sheet as secured—The Director, if can be said to have known the description to be false.

Section 282 of the Indian Companies Act speaks of statement which is false, which is known to be false, which is wilfully made and which is false in any material particular.

Unless a statute by itself or by necessary implications rules out *mens rea* as a constituent part of a crime, a person should not be found guilty of an offence against the criminal law unless he has got a guilty mind.

Srinivas Ma Berially v. King-Emperor (1) approved.

The language used by section 282 itself goes to import an element of *mens rea* when it speaks of the relevant statement being known to be false.

The Superintendent and Remembrancer of Legal Affairs, Bengal v. Akhil Bandhu Guha (2) referred to.

Section 132 (1) of the Indian Companies Act does enjoin that the Balance sheet shall give such particulars as will disclose the general nature of the liabilities and assets and how the value of the fixed assets has been arrived at.

The form of the Balance sheet is contained in Form F in the Appendix and Item (i) under "secured loans" speaks of loans on mortgage of fixed assets whereas Item (iv) under "unsecured loans" speaks of advances by Directors or Manager and Managing Agents.

The agreement to mortgage dated 1st January, 1939, gave the mortgagee an option to call for the immediate payment of the entire sum if the company did not obtain the sanction of the Government within the time stipulated,

*Criminal Appeal No. 241 of 1947, against the order of the Chief Presidency Magistrate.

(1) (1947) 51 C. W. N. 900.

(2) (1936) 40 C. W. N. 1341.

It did not make it binding on him to do so but he could yet insist on the execution of the mortgage. The loan here seems to be of an intermediate variety which could not be properly and correctly described either as a secured loan or an unsecured loan and it was therefore a case in which it was wholly impossible to conform strictly to Form "F" as set out in Companies Act.

Having regard to the somewhat anomalous character of the loan which was not secured by any formal deed of mortgage but which was yet entitled to come to be so secured if the mortgagee insisted on the fulfilment of the agreement, it appears that the director cannot be said to have known the description to be false.

Appeal by the Director of the Company under section 411 of the Code of Criminal Procedure.

The material facts appear from the judgment.

Messrs. N. K. Basu, Probodh Chandra Chatterjee, Bireswar Chatterjee and Mrityunjay Dey for the Appellant.

Mr. Bimala Charan Deb for the Crown.

Messrs. Narendra Nath Mitra and Saroj Kumar Chatterjee for the Complainant.

The following judgments were delivered :

Chakravartti, J. :—The appellant, Pulin Chandra Daw, has been convicted by the learned Chief Presidency Magistrate, Calcutta, under section 282 of the Indian Companies Act and sentenced to detention till the rising of the Court as also a fine of Rs. 1000 in default rigorous imprisonment for nine months. The act for which he has been so convicted and sentenced is that he, as a Director of of the Santal Parganas Electric Supply Corporation Limited, made in the balance sheet of that Company for the year 1944, a statement to the effect that the Company owed a debt of Rs. 73000 secured by a first mortgage on all its properties and undertakings, although in fact, there was no such mortgage and that he thus made a false statement, knowing it to be false in a material particular in the said balance sheet.

The facts are simple and are not disputed. It appears that a firm called Dutta Brothers obtained a license from the Government of Bihar for the supply of electricity within the town of Deoghar and adjacent localities and the present Company was formed with the object of taking over and exploiting that license. The first Managing Agents of the Company were the firm of Dutta Brothers. Sometime later one of the partners of that firm died but the Government of Bihar permitted the surviving partner to hold and exploit the license for a further period of one year. Dutta Brothers thereupon continued to be the Managing Agents till April, 1941 when another firm Daw's Agency, of which the appellant is a

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member took over the Managing Agency. Previously, the appellant had lent to the Company various sums of money and in respect of those advances an agreement had been entered into on the 8th November, 1938 between the Company, the then Managing Agents Dutta Brothers and the appellant by which the Company undertook to execute in favour of the appellant a mortgage for Rs. 40,000 within a certain period. Thereafter certain further sums were lent by the appellant and all the debts were consolidated in the year 1939 and on the 1st January of that year a second agreement was entered into between the same parties by which the Company agreed to execute a mortgage in favour of the appellant for a sum of Rs. 73,000. It was stipulated that the Company would apply to the local Government for the necessary sanction to create a mortgage within three months of the agreement and that the formal mortgage would be executed within a period of one month from the date of the sanction. A further clause provided that if the Company failed or neglected to apply for or to secure the sanction of local Government within the time aforesaid, the mortgagee would be entitled to call for immediate repayment of the whole amount. In fact however, no application was made to the Government for sanction, nor was any mortgage ever executed. The balance sheet of 1941 shows debts owing by the Company to the appellant which apparently included the aforesaid sums, but no mention is there made of any mortgage. No balance sheets were published either in the year 1942 or 1943 on account, it is said, of the ban, then existing, on the disclosure of details regarding public utility Companies, but in 1944 a balance sheet was published which contained an entry to the following effect ; "Loans secured on first mortgage of all the properties and undertakings.....Rs. 73,000". It is this entry which is the subject-matter of the present charge against the appellant.

The complainant was a share-holder of the Company, holding a single share of Rs. 10 and also a small creditor. Apparently, he has not been very friendly to the Company and when in the year 1943 another share-holder made an application to the Patna High Court for the winding up of the Company, he swore the affidavit in support of that application. That application was rejected. Subsequently, at the general meeting of the share-holders called to consider the balance sheet for the year, 1944, the complainant raised various objections and among them he asked for information as to how the balance sheet had come to contain an entry to the effect that the sum of Rs. 73,000 had been borrowed on executing

a first mortgage. It appears that the Chairman asked the appellant to explain this entry and the appellant stated then and there that no mortgage deed had in fact been executed. The complainant seemed to be satisfied for the time being with the information disclosed but subsequently brought the case which resulted in the present conviction of the appellant.

Certain facts are clear. It is not disputed that there is no formally executed mortgage by which the loan of Rs. 73,000 is secured. On the other hand it is not disputed that the appellant did advance a sum of Rs. 73,000. It appears further, as already stated, that when the disputed entry was challenged at the meeting of the share-holders the appellant at once disclosed the real facts. As to how the entry came at all to be made, it appears that Ex. H. which is a draft statement as regards the position of the Company supplied by the Managing Agents to the Auditors, described this loan as unsecured one but added it had been taken as per agreement dated the 8th November, 1938 and the 1st January, 1939. The final balance sheet which is Ex. G in the case was ultimately prepared by the Auditors from Ex. H but there the loan of Rs. 73,000 was described as a loan secured by the first mortgage of all the properties and undertakings of the Company.

The learned Magistrate has found that since no mortgage admittedly exists, the statement that the loan was a secured one was demonstrably false. He has found further that inasmuch as the appellant voted for the adoption of the balance sheet containing the said entry even after the entry had been challenged, it must be held that he made the statement wilfully and he knew it to be false. As regards the motive of the appellant in making a false statement the learned Magistrate found that the motive was obvious inasmuch as he himself was the creditor. On the above findings, the learned Magistrate convicted and sentenced the appellant as already stated.

The facts being as recounted above, the only question for our consideration is whether an offence within the meaning of section 282 of the Indian Companies Act has been established. Mr. Deb who appeared on behalf of the Crown contended that all that the said section required was that there must be a statement in a balance sheet that it must be known to be false, that it must be made wilfully in the sense that it must be intended to be made and it must relate to some material particulars. Given these elements Mr. Deb proceeded to contend, it was altogether irrelevant whether the person responsible for making the statement had any criminal

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intention at all or intended to deceive or succeeded in deceiving anybody. In support of his contention Mr. Deb relied strongly on the decision of Cunliffe and Henderson, JJ. in *The Superintendent and Remembrancer of Legal Affairs, Bengal v. Akhil Bandhu Guha* (1).

It is not necessary for us, nor is it possible to lay down any proposition of universal application. It is true that the Companies Act speaks of statement which is false, which is known to be false, which is wilfully made and which is false in any material particular. Our enquiry in the present case must, therefore be as to whether these elements are supplied by the special facts. The document concerned here is balance sheet and section 132(1) of the Indian Companies Act does enjoin that the balance sheet shall give such particulars as will disclose the general nature of the liabilities and assets and how the value of the fixed assets has been arrived at. The form of the balance sheet is contained in Form "F" set out in the Appendix to the Act and one finds there that loans are classified into two classes, "secured" and "unsecured". Item (i) under "secured loans" speaks of loans on mortgage of fixed assets. Item (iv) under "unsecured loan" speaks of advances by the Directors or Manager and Managing Agents. It is unnecessary to refer to the other items under the two heads, none of which seems to be appropriate to the kind of loan with which we are here concerned. Recalling now the facts of this case, it has to be observed that although no formal mortgage had been executed, the loan could not be said to be an unsecured loan, pure and simple. There was the agreement to mortgage, dated the 1st January, 1939 and although that document gave the mortgagee an option to call for the immediate payment of the entire sum if the Company did not obtain the sanction of the Government within the time stipulated, it did not make it binding on him to do so. It appears that he could yet insist on the execution of the mortgage. The loan here seems to be of an intermediate variety which could not properly and correctly be described either as a secured loan or an unsecured loan. It was therefore a case in which it was wholly impossible to conform strictly to Form "F" as set out in the Indian Companies Act.

In this state of the facts, the question we have to ask ourselves is, can it be said that the statement contained in the balance sheet was false and known to be false? In our opinion, on the special facts of the case, the answer must be in the negative. It is not necessary to decide finally one way or the other the contention of

Mr. Deb that question of *mens rea* are altogether irrelevant to a charge under section 282 of the Indian Companies Act. We might however refer to the recent decision of the Privy Council in the case of *Srinivas Ma Baisilly v. King-Emperor* (1), where their Lordships quoted with approval the proposition, laid down in an earlier case, which is to the effect that "unless a statute by itself or by necessary implication rules out *mens rea* as constituent part of a crime, a person should not be found guilty of an offence against the criminal law unless he has got a guilty mind." Be that as it may, it appears to us that the language used by section 282 itself goes to import an element of *mens rea* when it speaks of the relevant statement being known to be false. In the case cited by Mr. Deb both the Judges in fact found *mens rea* although they stated by way of general proposition that the term wilfully did not embrace or involve a guilty intention. In our opinion, assuming that the appellant made the statement in the present case wilfully, that is to say, intending that it should be made and assuming further that the statement was false or incorrect in a material particular, it is still a question whether the appellant knew it to be false.

Having regard to the somewhat anomalous character of the loan which was not secured by any formal deed of mortgage but which was yet entitled to come to be so secured if the mortgagee insisted on the fulfilment of the agreement, it appears to us that the appellant cannot be said to have known the description to be false.

Reference may further be made in this connection to the draft statement supplied by his office to the Auditors in which he stated in quite a correct and straightforward manner that the loan was unsecured and that it had been advanced as per the two agreements. If on that information the auditors described the loan in the balance sheet as "secured" and the appellant signed that document he accepted a description which was hardly more inappropriate than the description "unsecured" would have been.

In the above view of the matter, it has not, in our view, been established that the appellant made a statement which was false and known to be so.

The conviction and sentence of the appellant are accordingly set aside and he is acquitted. The fine, if paid will be refunded.

Roxburgh, J. :—I agree.

B. K. B. ; S. C.

Appeal allowed :

*Conviction and sentence set aside and fine,
if paid, to be refunded.*

(1) (1947) 51 C. W. N. 900.

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PRIVY COUNCIL.

PRESENT: *Lord Thankerton, Lord Uthwatt and Sir Madhavan Nair.*

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RAMJI RAM AND OTHERS.

[ON APPEAL FROM HIGH COURT OF JUDICATURE AT PATNA].

Partition suit—Agreement between parties—Rights of parties—Son born after institution of partition suit but before decision.

The Karta of a joint Hindu family governed by Mitaksha School of Hindu Law entered into an agreement with his sons, by which a separate money allowance was agreed upon and their messes became separate from their father. As a result of this arrangement, they left the family house. The payment went on for sometime and altogether ceased sometime before the institution of partition suit by one of the sons :

Held, that the son who was defendant, was entitled to claim the arrears of maintenance from the Karta who was also defendant in the partition suit and was entitled to the relief to the extent to which he would be able to prove his claim.

A son begotten as well as born after the partition, where a share has been allotted to the father is not entitled to have the partition re-opened and to claim a re-distribution of the shares. He is only entitled to succeed to his father's share and to his separate or self-acquired property to the exclusion of the divided sons.

A son born after the institution of partition suit but before the actual division of the estate cannot claim a separate share in the joint family estate as an "afterborn son".

Girja Bai v. Sadashiv Dhundiraj (1) referred to.

Privy Council Appeal No. 25 of 1945 from a judgment and decree of the High Court of Patna, dated the 8th May, 1941, which varied a decree and judgment of the 3rd Subordinate Judge of Patna, dated the 10th April, 1937, decreeing the partition of the joint family property.

Appeal by the Plaintiffs, and Defendants Nos. 2 and 5.

The judgment of their Lordships was delivered by

Sir Madavan Nair :—These are consolidated appeals by the plaintiffs, defendant No. 2, and defendant No. 5, from a judgment

(1) (1916) L. R. 43 I. A. 151; L. R. 43 Cal. 1031; 24 C. L. J. 207.

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and decree of the High Court of Patna, dated 8th May, 1941, which varied a decree and judgment of the third Subordinate Judge of Patna, dated 10th April, 1937, decreeing the partition of the joint family property.

The appeals arise out of a suit for partition instituted by plaintiff No. 1 (hereinafter called the plaintiff), and his son, plaintiff No. 2, against defendant No. 1 (hereinafter called the defendant) and defendants Nos. 2 to 4, the other members of a joint Hindu family governed by the Mitakshara law. Defendant No. 3 was a minor at the time of the suit but became a major subsequently. Defendant No. 5 was born more than three years after the suit began, and was made a party to the suit.

The following questions raised by the plaintiffs, defendant No. 2, and defendant No. 5, respectively, in their appeals, arise for determination before the Board :—

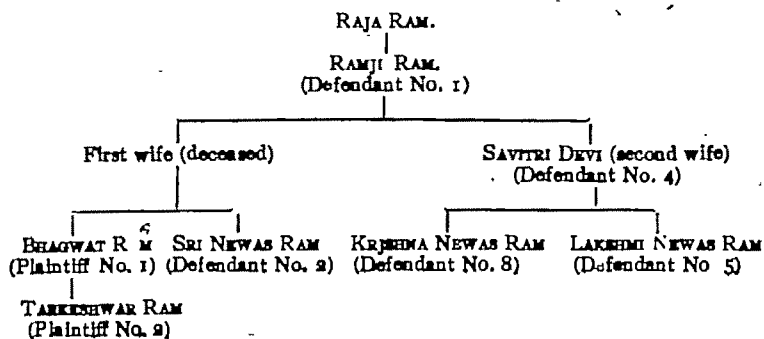
1. Whether Items 27, 28, 29, valuable articles of jewellery, mentioned in the amended Schedule II of the plaint have been established to belong to the joint family.

2. Whether the Courts below should have held that defendant No. 2 was entitled to arrears of maintenance.

3. Whether it was open to defendant No. 5, born more than three years after the partition suit began, but before the actual division of the estate, to claim a separate share in the joint family estate as an "after born son", i. e., in other words, whether the Courts below should have held that the plaintiff and defendants Nos. 1 to 5 were each entitled to 1/6th share in the property.

Other questions raised in their appeals were abandoned by the appellants in the course of the hearing of the appeals.

To appreciate the arguments, a few facts not disputed may be mentioned. The following genealogical table shows the relationship of the parties :



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The defendant was the Karta of the joint Hindu family composed of himself and the rest of the parties to the suit. The plaintiff and defendant No. 2 are his sons by his first wife deceased. Plaintiff No. 2 is the son of the plaintiff No. 1. Previous to this litigation there had been a family dispute between the defendant and his father Raja Ram, on one side and a collateral, Saligram, on the other. This was settled by a compromise in 1912, on the terms *inter alia*, that each party should retain possession of the jewellery and ornaments which were in its exclusive possession at the time of the compromise, and that the remainder should be divided later. That division took place in 1918, and the present plaintiff and the defendant came into possession of the items allotted to their share.

In 1918, the defendant married his second wife, defendant No. 4. The plaintiff was married in 1925. Soon after his marriage, ill-feeling arose between the plaintiff and his father. In 1929, the defendant agreed to make a separate allowance to the plaintiff and his brother, defendant No. 2, and continued making the allowance till July, 1931, when he ceased payment to both the plaintiff and defendant No. 2. The plaintiff then made a demand for partition which was refused, and then the suit out of which these appeals arise was instituted by the plaintiffs for partition of the joint family properties. The suit was instituted on 15th July, 1932.

For the purpose of these appeals, it is not necessary to refer to the various contentions of the parties. The findings of the Courts below to which their Lordships will now call attention show with sufficient clearness the nature of those contentions. Their Lordships will refer only to those findings which have been the subject of controversy before the Board, omitting the rest to which no exception has been taken before them.

Along with the plaint, 12 classified schedules of movable properties were filed, of which schedule I contained, amongst other items, items 1 and 5, valuable "Puja" articles. Item No. 1 is a Dakshinavarat Sankh, and Item 5 is an Ekmukhi Rudraksha." The Subordinate Judge found that these articles were in the possession of the defendant. As he did not produce them, the Subordinate Judge directed "that after the preliminary decree was passed the values of these articles for the purpose of making partition should be determined by the Court itself allowing the parties to produce further evidence which they may choose to adduce." The High Court did not think it right to interfere with this direction. It may be stated here that as regards the method of

determining the value of these articles not produced by the defendant, Mr. Rewcastle, the learned counsel appearing for the plaintiffs, argued that the Courts should have held that the maxim *omnia præsumentur contra spoliatores* applied, but after some discussion the learned counsel was satisfied that the direction given by the Courts was not wrong and so the objection was withdrawn.

Schedule II of the plaint contained a list of the jewellery which, the plaintiff alleged, belonged to the joint family. In the schedule filed along with the plaint there were 26 items. Eight further items were added by an amendment of the plaint on 2nd July, 1936. Items 27, 28, 29, described as *Moti ka Jausan*, *Milam Kangaul* and bunch of pearls, worth Rs. 30,000, Rs. 18,000 and Rs. 4,000, respectively, are the first three of these 8 items. Of these, the Subordinate Judge found that item 27 was a family jewel liable to be partitioned and in the custody of the defendant, but he had not produced it. As regards items 28 and 29, he held that it was not proved that they were family jewels or that they were in the custody of the defendant.

The High Court held that there was not satisfactory evidence to establish that any of the three items were family jewels or that they were in the possession of the defendant.

The Subordinate Judge disallowed the claim for arrears of maintenance made by defendant No. 2. The High Court accepted that finding.

The Subordinate Judge further held that the birth of defendant No. 5 did not affect the shares to be allotted to the plaintiff and defendant No. 2. The High Court agreed with this view also.

In the result the Subordinate Judge passed a preliminary decree for partition in accordance with the directions contained in his judgment, awarding the plaintiffs a one-fifth share, defendant No. 2 a one-fifth share and defendants Nos. 1, 3, 4 and 5 a three-twentieth share each, in the properties of the family.

Against the preliminary decree, appeals were preferred to the High Court by the plaintiffs and defendants Nos. 2, 4, 5. In the appeal preferred by the plaintiffs, cross objections were filed by defendants Nos. 1 and 3.

The High Court varied the decree passed by the Subordinate Judge in certain respects. For the purpose of these appeals, the following variations may be mentioned. The High Court varied the decree to the extent that (1) the item of property in dispute,

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namely, a Jausan of pearls (Item 27) should not be included in the list of joint family properties (2) that defendant No. 3 be allotted a one-fifth share of the entire family properties. As he had attained majority during the pendency of the appeal and claimed separation of his share, the High Court, though he had not preferred an appeal, allowed him a one-fifth share which he was entitled to in order to avoid unnecessary litigation. Mr. Rewcastle stated at the commencement that he would contend that this decision was wrong but very properly abandoned this argument.

Turning now to the appeal preferred by the plaintiffs, the only question which their Lordships have to consider is whether the finding of the High Court that none of the items 27, 28 and 29 belongs to the joint family can be maintained. To prove that these items are the family jewels in the possession of the defendant, the plaintiff relies mainly upon entries in the account books L2 (12) and Z15 and Z16. L2 (12) mentions all the three jewels, while Z15 and Z16 refer, according to the plaintiffs, to Item 27. Both Courts have found L2 (12) not genuine and unreliable; while the High Court, differing from the trial Court, has held that Z15 and Z16, in view of the defendant's explanation, cannot be accepted as supporting the plaintiffs' case.

L2 (12) is found in D9 (Kacha Rokar Bahi), an account book for the years 1927-29. Comparing the position of miscellaneous entries such as these, in the various account books of the family, the learned Judges of the High Court state that L2 (12) is at "an unusual place". Their Lordships have not had the advantage of examining these books, but they find that the conclusion arrived at by the learned Judges is supported by the reason given by them to which no valid exception has been taken. There are other grounds also for holding that the entry is not genuine. D9 is one of the numerous books filed by the defendant on 20th July, 1932, soon after the institution of the suit, but this entry was discovered only when the defendant was cross-examined on 29th April, 1936. It is not known when the plaintiff or his lawyers discovered it. When the defendant's attention was drawn to this entry he denied that this was in the "Bahi" when it was produced in Court. The Subordinate Judge thought that some unauthorised person must have interpolated it in the "Bahi" while it was in the custody of the Court. The learned Judges of the High Court, while holding that the explanation is not likely, came to their final conclusion that the entry is not genuine on more cogent grounds. According to the evidence these valuable articles used to be exposed to view

year after year on the occasion of the "Diwali" festival. It is extraordinary that the plaintiff and his witnesses, while remembering all the articles mentioned in the plaint, many of which are of insignificant value, should have forgotten to mention these valuable articles when the plaint was filed. As already stated, these articles were added to the Schedule II as items 27, 28, 29, by amending the plaint on and June, 1936. If these articles had existed, their Lordships agree with the High Court in thinking that they would have been included in the original second schedule to the plaint. For this and the other reasons given by the Courts below their Lordships hold that L₂ (12) has not been proved to be genuine and reliable.

Z₁₅ and Z₁₆ are two entries in defendant's "Pakka Rokar Bahi" for the year 1912-13 (which the plaintiff says refers to item 27). These show that Rs. 10 and Rs. 15-3-0 were sent to the firm of Lala Genda Lal Banshidar for repairing a Jausan of pearls.

The explanation of the defendant is that Genda Lal's mother was a daughter of the defendant's father's sister, that she used to come and stay with him, and that these entries might relate to her Jausan of pearls sent for repairs. As already observed, it is inconceivable that the plaintiff should have forgotten to mention this valuable article in Schedule II filed along with the plaint. The explanation given by the defendant about these two entries in his account book appears to be reasonable, especially so having regard to the finding that L₂ (12), which mentions this item along with the other two items, has not been found to be genuine. As held by the High Court, the evidence given by the plaintiff is not sufficient to prove that any of these three items belongs to the joint family.

In his appeal, the only relief pressed by defendant No. 2 relates to his claim for arrears of maintenance. In their Lordships' view the Courts in India have not dealt with this question adequately. The High Court says that the remedy of coparcener who is dissatisfied with the conduct of the Karta of the family is by way of partition and not by way of claim for damages; but the claim of defendant No. 2 in the present case for arrears of maintenance stands on a different footing and is distinguishable. It is not disputed that the defendants entered into an agreement with defendant No. 2 and his brother, the plaintiff by which in 1929 a separate allowance of Rs. 250 for each was agreed upon and their messing became separate from their father and his second

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wife. As a result of this arrangement, they left the family house. It is alleged that the payment went on for some time and altogether ceased after July, 1931. The present suit was instituted on 15th July, 1932. This agreement is referred to in the judgments of both Courts in India. The claim for relief is based upon a distinct agreement and the failure on the part of the defendant to carry it out. In their Lordships' view, defendant No. 2 is entitled to relief to the extent to which he will be able to prove his claim. Their Lordships would, therefore, direct that provision should be made for this item in the preliminary decree.

Ground No. 4, relating to the expenses of his marriage, was given up by defendant No. 2 and Ground No. 5, relating to liability to account for the value of the articles enumerated in Schedule III and for other articles, after being touched upon, was also abandoned.

The only question in the appeal by the defendant No. 5 is whether he is entitled to get a share equal to that of persons in the same class as himself though he was born after the suit for partition. It is not disputed that he was begotten as well as born after the institution of the suit for partition. The institution of such a suit by a member of a joint Hindu family effects a severance of the joint status of the family. The plaintiff and defendant No. 2 had effected in the case the severance of their joint status in 1932; and from that date they became entitled each to one-fifth share of the joint family properties. If the claim of defendant No. 5 is accepted, their shares will necessarily be reduced. The rights of a son born after partition—often referred to as an “after born son”—under the Hindu law, was much discussed by Hindu Jurists, for the ancient texts bearing on the question are conflicting; but it is not necessary to examine these texts as the law to be applied is now well understood by the Courts in India and has also been correctly applied in this case. It is enough to state that the law is well settled that a son begotten as well as born after the partition, where a share has been allotted to the father, as in the present case, is not entitled to have the partition re-opened and to claim a re-distribution of the shares. He is only entitled to succeed to his father's share and to his separate or self-acquired property to the exclusion of the divided sons. This is the only point which their Lordships have to decide in the appeal by defendant No. 5. The only ground on which his claim is urged by Sir Herbert Cunliffe is that though born after the suit partition has not been completed by actual division of the estate. This argument is fallacious. Delivering the judgment of

the Board in *Girja Bai v. Sadashiv Dhundiraj* (1). Mr. Ameer Ali pointed out "In Hindu law 'partition' does not mean simply division of property into specific shares; it covers, as pointed out by Lord Westbury in *Appovier's* case (2), both division of title and division of property". In the same judgment reference is made to another observation of Lord Westbury, "It is necessary to bear in mind the two-fold application of the word 'division'. There may be a division of right, and there may be division of property."

Mr. Ameer Ali points out that severance of status which is a matter of individual volition should not be confused 'with the allotment of shares' which may be effected by different methods. The learned counsel's argument would involve this confusion. The fact that actual division by metes and bounds has not taken place cannot in any way affect the quantum of share to which the plaintiff and defendant No. 2 have already become entitled; in so far as their rights are concerned partition has already taken place and their shares cannot be diminished by the subsequent birth of the fifth defendant.

There remain no further questions for determination in these appeals before the Board. In the result, their Lordships will humbly advise His Majesty that the High Court's decree should be upheld with the variation as regards the claim of defendant No. 2, with respect to arrears of maintenance due to him. Their Lordships make no order as regards cost before the Board.

Douglas, Grant & Dold : Solicitors for Bhagwat Ram Appellant.

W. W. Box & Co. : Solicitors for Ramji Ram.

Douglas, Grant & Dold : Solicitors for Sri Nemas Ram.

A. T. M.

Appeal dismissed &

Decree varied.

(1) (1916) L. R. 43 I. A. 154; I. L. R. 43 Calc. 1031; 24 C. L. J. 207.

(2) (1866) 11 Moo. I. A. 75.

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PRESENT: *Lord Wright, Lord Du Parcq, Sir Madhavan Nair and Sir John Beaumont.*

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT ALLAHABAD.]

Income tax—Indian Income Tax Act (XI of 1922), section 14(1)—Maintenance allowance under an agreement between Hindu widow and coparceners of joint Hindu family—Nature of Hindu widow's right to maintenance.

The widow of a deceased coparcener in a joint Hindu family governed by Mitakshara law has a right of maintenance against the surviving coparceners of the joint family *quod* the share of her deceased husband which they take by the rule of survivorship. This is an absolute right which accrues to her as a member of the joint family. It does not form a charge on the properties of the family, but when necessary, it may be made into a charge on a specific portion of the joint family properties not exceeding her husband's share. Separate maintenance may be provided for by an allowance of money or by an assignment of land.

A widow of a member of a Mitakshara Hindu undivided family, who was receiving certain amount of money per month for maintenance under an agreement with the male members of the family, up to the date of disruption of family by partition and thereafter from some of the separated members of the said family, is entitled to claim exemption from payment of income tax with respect to that amount under section 14(1) of the Indian Income Tax Act, 1922, after the disruption of the undivided family.

Commissioner of Income-Tax, Behar & Orissa v. Maharani Lakshmiipati Sabeeta (1) discussed.

If a Hindu widow proves that she is receiving the allowance in question by virtue of her right or in her capacity as a member of the Hindu undivided family, then she is entitled to claim the benefit of section 14(1) of the Indian Income Tax Act, 1922. The coparceners can break up the family, but they cannot by so doing deprive the widow of her right to receive the maintenance as a member of joint family.

In the course of mutation proceedings, a widow of a member of joint Hindu family came to a compromise and a deed of agreement was executed, whereby the widow acknowledged her status to be that of a widow in a Hindu

undivided family, and further declared that as such she was not entitled to the estate of her husband. It was provided by this document that the male members would pay as maintenance allowance a sum of Rs. 1000 per mensem to her. It was also provided that in order to secure payment of the allowance to the widow the male members would be personally responsible and their property moveable and immovable would both be liable :

Held, that the maintenance right of the widow had not lost its original character of what was due to her from the income of the joint family as a member of the Hindu undivided family.

Privy Council Appeal No. 86 of 1944, against the judgment and decree of the High Court of Judicature at Allahabad, dated 15th October, 1940, passed on a reference made under section 66(2) of the Indian Income Tax Act No. XI of 1922, which set aside an order of the Assistant Commissioner of Income Tax dated the 7th September, 1938.

Millard Tucker, K. C., W. Wallack and R. Parikh for the Appellant.

Sir Herbert Cunniffe, K. C. and Jayakar for the Respondent.

The judgment of their Lordships was delivered by

Sir Madhavan Nair :—This is an appeal by special leave by the Commissioner of Income-tax, Central and United Provinces hereinafter called "the appellant" from a judgment and decree of the High Court of Judicature at Allahabad, dated 15th October, 1940, passed on a reference made under section 66(2) of the Indian Income Tax Act No. XI of 1922, which set aside an order of the Assistant Commissioner of Income-Tax dated 7th September, 1938.

The assessee (hereinafter called "the respondent") was assessed to income tax for the year, 1935-1936 on the allowance of Rs. 12,000 per annum which she was receiving for maintenance as the widow of one Kalyan Singh. The tax payable comes to Rs. 875.

The question of law referred to in the decision of the High Court was "whether the sum of Rs. 1,000 per month received by the petitioner (meaning the respondent) in the account year 1934-1935 was received by her as a member of a Hindu undivided family within the meaning of section 14(1) of the Act". That section reads as follows :—

"The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family."

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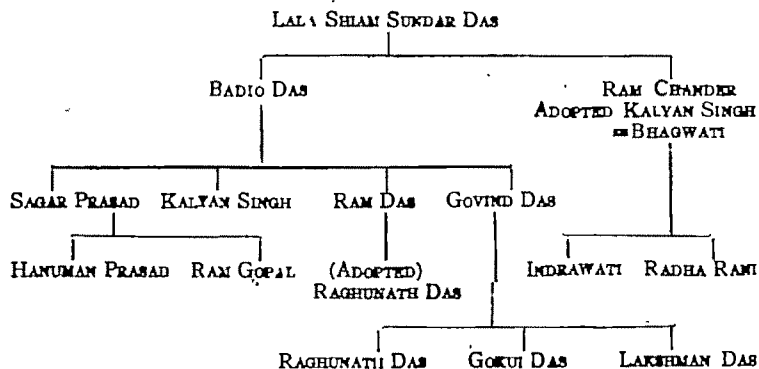
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The Income-Tax Officer answered the question in the negative, and on appeal, his decision was confirmed by the Assistant Commissioner of Income-tax. The appellant also was of opinion that the question should be answered in the negative. The High Court, however, answered the question in the affirmative.

Kalyan Singh, the husband of the assessee, along with his brothers, nephews and cousins formed a Hindu undivided family governed by the Mitakshara law. The genealogical tree of the family is as follows :—



Kalyan Singh died on 18th October, 1918, and the surviving members of the family became entitled to the whole of the family estate including the share of Kalyan Singh deceased. In the course of the mutation proceedings, the respondent contended that her husband died as a separated member of the family and that she was heir to her husband. This contention was disallowed by the Revenue Court. The parties, however, eventually came to a compromise and a "deed of agreement" was executed on 10th October, 1919, whereby as mentioned in the statement of the case submitted by the appellant, the assessee acknowledged her status to be that of a widow in a Hindu undivided family, and further declared that as such she was not entitled to the estate of Kalyan Singh. It was provided by this document that the first party (male members) "will pay as maintenance allowance a sum of Rs. 1,000 every month to Musammat Bhagwati (the respondent) second party." It was also provided that in order to secure payment of the allowance to the respondent "the first party will be personally responsible and our property movable and immovable will both be liable." The deed ended with the statement "I, the second party will have no rights or interests in the family property excepting as aforesaid." It is not necessary to refer to the other

provisions of the agreement for the purpose of this appeal. Thereafter, the allowance was regularly paid to the respondent. On 9th April, 1923, there was a partition in the family which disrupted into five separate groups, as follows :—

(1) Hanuman Prasad and Ram Gopal, sons of a deceased brother of Kalyan Singh.

(2) Govind Das, brother of Kalyan Singh.

(3) Raghunath Das, the son of Govind Das, who was adopted by Ram Das, a deceased brother of Kalyan Singh and Govind Das.

(4) Gokul Das.

(5) Lachman Das.

At the disruption, Hanuman Prasad and Ram Gopal on the one side (Group 1), and Govind Das on the other side (Group 2), each agreed to contribute Rs. 500 to the respondent towards the monthly allowance of Rs. 1,000 that was being paid to her. Thus, at the material period the respondent was in receipt of a maintenance allowance of Rs. 1,000 a month, partly from the first group and partly from the second group. It should be stated here, that to none of the disruption proceedings was the respondent a party.

In the above circumstances, the Income-tax Officer assessed the respondent on her allowance of Rs. 12,000 received by her during the account year 1934, 1935, overruling the objections raised on her behalf that she was receiving the amount as a member of a Hindu undivided family within the meaning of section 14(1) of the Act, holding that after the disruption of the family in 1923 "owing to the fact of the payment of the allowance to Musammat Bhagwati (respondent) by these persons the Musammat cannot be said to be a member of the family of either of them. It is clear that she is not a member of any Hindu undivided family existing at present....." He also added as a supplemental ground that the allowance that the respondent had been getting was only by virtue of the deed of agreement and as such was not exempt under the Act. As already mentioned this order was confirmed by the Assistant Commissioner.

In stating the case to the High Court, the appellant based his opinion on the ground that the Hindu undivided family to which the respondent once belonged, became disrupted in 1923, and partitioned itself into five separate entities in none of which the respondent has any "legal place".

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According to his view, "the maintenance allowance which the petitioner is now receiving from two of these entities is not being received by her as a member of a Hindu undivided family as there is no undivided family in existence to which she can at present be said to belong." It will be observed that in negating her claim he did not refer to the supplemental ground based on the agreement of 10th October, 1919, relied on by the Income Tax Officer and the Assistant Commissioner. Thus, the question that fell to be decided by the High Court on the reference was whether the respondent who was receiving Rs. 1,000 per month for maintenance up to 9th April, 1923, as a widow in a Hindu undivided family was entitled to claim exemption from payment of the income-tax with respect to that amount under section 14(1) of the Act, after the disruption of the undivided family.

In support of the exemption, two grounds were urged in the High Court on behalf of the respondent. In the first place, it was argued that having originally received the allowance as a member of a Hindu undivided family, she is nevertheless receiving the allowance in that capacity within the meaning of section 14(1) of the Act. The learned Judges did not deal with this ground, but characterising it as one "not altogether without force" they proceeded to discuss the other ground next urged which they thought was "a firmer one" for the respondent, namely, that she has not ceased to be a member of a Hindu undivided family at all, despite the subsequent disruption amongst the co-parceners, and on this, they came to the conclusion that "after the disruption of the family on 9th April, 1923, the assessee continued to be a member of a Hindu undivided family with each of the entities into which the family disrupted irrespective of whether any such entity consisted of one male member or of several male members." Upon this view of the matter they held that the respondent was entitled to claim exemption under section 14(1) of the Act. The learned Judges answered the reference, as expressly stated by them, on the assumption that up to 9th April, 1923, the respondent was receiving her allowance as a widow of a Hindu undivided family.

To show that the decision of the High Court cannot be supported, Mr. Tucker, the learned counsel for the appellant, submitted two arguments for their Lordships' consideration, viz. :—
(1) Assuming that the respondent was receiving the maintenance allowance as a member of a Hindu undivided family till the disruption of the family into 5 groups in 1923, she is not entitled to claim the benefit of section 14(1) of the Indian Income Tax

Act, as according to the learned counsel's reading of the section the three following conditions required for its operation cannot be said to exist in her case, these being (a) the assessee must be a member of a Hindu undivided family at the time of the assessment, (b) the income in question must be received by the assessee in virtue of her capacity as a member of the joint family, and (c) the allowance must be received out of the income of the joint family, explained as meaning that what is received must be part of the income of the family of which the assessee was a member. Shortly stated, this argument has reference to the two facts that at the time of the assessment, the Hindu undivided family from which the respondent was receiving the maintenance allowance had become disrupted in 1923 into 5 groups, to none of which it is alleged she belonged, and that at the time of the assessment she was receiving the allowance under the deed of agreement of 1919 and not from the taxable income of the Hindu undivided family. (2) The learned counsel's second argument was that under the deed of agreement the respondent must be considered to have surrendered all her rights to maintenance as such out of the income of the family and what she received has become a money allowance taxable under the Act.

The law is well settled that the widow of a deceased co-parcener in a joint Hindu family has a right of maintenance against the surviving co-parceners of the joint family quoad the share of her deceased husband which they take by the rule of survivorship. This is an absolute right which accrues to her as a member of the joint family.

It does not form a charge on the properties of the family, but when necessary, it may be made into a charge on a specific portion of the joint family properties not exceeding her husband's share. Separate maintenance may be provided for, by an allowance of money, or by an assignment of land.

It cannot be disputed that at its inception, the allowance made payable by the male members under the deed, was maintenance which the respondent was entitled to receive in her capacity as the widow of a Hindu undivided family. She received it as maintenance due to her, as the widow of Kalyan Singh. The first line of argument proceeds upon the assumption that up till 1923 the respondent was receiving maintenance as the widow of a Hindu family. Whether under the deed of 1919, the allowance lost its nature as maintenance allowance is a different question which their Lordships will consider later. The argument on the part of the

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respondent is that the allowance is being received by her in her capacity or status as a widow of a Hindu undivided family and the capacity in which she was receiving it, is not affected by the severance in joint status that took place subsequently in 1923, in the family, to which she was not a party; and it is, therefore, exempt from taxation under section 14(1) of the Act, as the only requisite to be proved under the section is that she was receiving the allowance in question in her capacity as a member of the Hindu undivided family. As already stated this was the first argument put before the High Court which the learned Judges did not consider.

Under the Act, a Hindu undivided family is treated as a unit of taxation. Section 14(1) of the Act exempts an assessee from payment of the tax in respect of any sum which he receives as a member of a Hindu undivided family. It is clear that the object of the section is to avoid double taxation. The question in the present case is what has the respondent to prove in order to claim the benefit of the section. In support of his contention, Mr. Tucker relied on two decisions—*Commissioner of Income-tax, Bihar & Orissa v. Maharani Lakshmipati Sahiba* (1) and *Commissioner of Income-tax, Bihar and Orissa v. Visheswar Singh* (2). The judgment in both cases were delivered by Agarwala, J. In the first case, the learned Judge stated that section 14 (1) of the Act premises (1) a Hindu undivided family; (2) that the person claiming exemption is a member of the family; and (3) that the sum referred to is received as a member of the family. Then the learned Judge made general observations about the meaning and application of the section; but no occasion arose for the application of the principles which the learned Judge elucidated to the case before him, as he held on the facts, "that the assessee did not, during the assessment by the Income-tax Officer or in her appeal from that assessment, raise the issues necessary for the determination of the question of fact which arises under section 14(1)". The learned counsel submitted that as the conditions required for applying the section as stated in the judgment did not exist with respect to the respondent at the time of the assessment for reasons already explained, she is not entitled to claim exemption under the section. In their Lordships' view all that is required to be proved by the respondent at the time of

(1) (1934) L. L. R. 14 Pat. 313.

(2) (1935) L. L. R. 14 Pat. 785.

the assessment in order to claim exemption under the section is that she is receiving the sum in question in her capacity as a widow of the deceased co-parcener of a Hindu undivided family. If she proves that she is receiving the sum in that capacity or status, then she is entitled to exemption under the section. If the decision means that the respondent should prove anything more than what their Lordships have stated she should prove to claim the exemption, then they are unable with great respect to agree with it. The second decision relied on does not advance the appellant's case much further. In the next decision of the same Court, *Commissioner of Income-tax, Bihar & Orissa v. Maharani Manjuri Kuari* (1) which was stated by Mr. Tucker to be against him, the test to be applied when exemption is claimed under the section was thus stated by Fazal Ali, C. J. : "The question is whether the maintenance is received by her (the assessee) by virtue of some right whether based on custom or law, or is in the nature of a gift or indulgence." The learned Chief Justice followed the previous decision of his own Court, *Commissioner of Income-tax, Bihar & Orissa v. Vishwar Singh* (2) and various other decisions of other Courts including one of the Madras High Court, *viz., Commissioner of Income-tax v. Zamindar of Chemudu* (3), where it was held by Ramesam, J., with reference to the facts of the case that, "the question in the case is not whether the income belongs to the zamindar or whether it belongs to the joint family of which the assessee is a member, but whether the assessee received his payment as a member of a Hindu undivided family." Agarwala, J. in the second decision of the Patna High Court referred to above, thought that the principle was stated too widely in that case. A few other decisions were also referred to by the learned counsel. Their Lordships do not propose to discuss these decisions in detail, as it appears to them that the test to be applied when exemption is claimed under the section is clear and what they have already stated, *viz.*, if as in the present case a Hindu widow proves that she is receiving the allowance in question by virtue of her right or in her capacity as a member of the Hindu undivided family, then she is entitled to claim the benefit of the section. It was strenuously argued that because of the disruption of the joint family in 1923, the respondent can no longer claim herself to be member of a Hindu undivided family. Their

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(1) (1945) 13 I. T. R. 55 (6a) ; I. L. R. 24 Pat. 159 (169).

(2) (1935) I. L. R. 14 Pat. 785.

(3) (1934) I. L. R. 57 Mad. 1023 (1027).

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Lordships are unable to accept this contention. The respondent was not a party to the partition; it is true that the coparceners can break up the family, but they cannot by so doing deprive the widow of her right to receive maintenance as a member of the Hindu undivided family.

In their view, the question to which of the groups the respondent belongs after the disruption of the joint family in 1923, does not arise for decision in this case.

The next question is whether by the deed of agreement the respondent has surrendered her rights to maintenance from the joint family income and got substituted in its place by virtue of the deed, the payment of a money allowance which on account of its character as such has become taxable in her hands. Their Lordships have already referred to the real nature of a Hindu widow's right of maintenance. It is perhaps the most valuable right which a Hindu widow in a joint Hindu family under the Mitakshara law can have, as she has no right to a share in the joint family property and her right is to maintenance and maintenance only. The extreme worth of this right to a childless widow who has usually no other resource in a joint Hindu family must have been one of the aspects of the problem present to the mind of the Legislature when it exempted generally from taxation any sum which an assessee receives as a member of a Hindu undivided family.

Turning to the deed of agreement in the present case, it shows that the parties resorted to litigation in revenue Courts where the respondent raised the question that her husband died separate from the other members of the family, and as a result of the agreement which ended the dispute, she got what is described in the deed "as maintenance allowance, a sum of Rs. 1,000, every month" and what is more important, "in order to secure the payment of the monthly allowance" the first party under the deed (the male members) became personally responsible and our property movable and immovable became liable." It is clear that as the creation of a "charge," this provision in the deed made her right of maintenance safe and secure. The deed ended with the statement that the respondent "will have no rights or interests in the family property excepting as aforesaid," which means as correctly described by the Income-tax Commissioner, "whereby the petitioner (respondent) acknowledged her status to be that of a widow in a Hindu undivided family and declared that as such, she was not entitled to the estate of Kalyan Singh" her husband.

Their Lordships fail to see how by the above provisions the respondent has surrendered her rights to maintenance from the family properties. It was argued by Mr. Tucker that, "even though the respondent technically remained a member of the family, she ceased to receive the income by her title as a member of the family, but began to receive it by virtue of the deed which fixed a liability on the people concerned, irrespective of the land which belonged to them." Their Lordships cannot accept this view. As they read the deed, the respondent by virtue of it effectively secured her maintenance right which was an inchoate one, by getting a charge created to safeguard it. Referring to provisions for maintenance Sir Thomas Strange in his *Hindu Law*—See Vol. 1, page 231—observes "In whatever way the provision is made, care should be taken to have it secured. The manner of doing this is discretionary, there being no special law, directing how provision is to be made." The respondent in the present case has only acted on the advice generally tendered to make the position secure in such cases. Instead of surrendering her right to maintenance from the family income, she has now made it by the deed more secure and definite with the result that subsequent disposition, if any, of the property by the male members, will leave her rights unaffected. In their Lordships' view, the maintenance right has not lost its original character, of what is due to her from the income of the joint family as a member of the Hindu undivided family. To read the deed in any other sense will be to put a wrong construction on the document. Before they conclude, their Lordships should add that Sir Herbert Cunniffe, in further support of his case, urged that the appeal should be dismissed having regard to section 25A of the Income Tax Act which deals with "Assessment after partition 'of a Hindu undivided family.'" That section after stating in clause (1) :—"Where at the time of making an assessment under section 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit and if he is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions, he shall record an order to that effect....." states under clause (3) "where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family." It was argued that when in

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the course of assessment proceedings initiated after a partition in a joint Hindu family, the question is raised as in the present case, whether the assessee still remains a member of a Hindu undivided family, it is incumbent on the Income-tax Officer to pass an order as required by clause (1) of section 25A, and such an order not having been produced in this case, the appeal should be dismissed. The point is a new one and except for some departmental correspondence proper materials for deciding the question have not been placed before their Lordships. In the circumstances their Lordships refused to hear arguments on this new point.

For the reasons mentioned above their Lordships will humbly advise his Majesty that this appeal should be dismissed with costs.

Solicitors, India Office : Solicitors for the Appellant.

Chapman, Walkers : Solicitors for Respondent.

A. T. M.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice G. N. Das.

JITENDRA NATH MONDAL

v.

NANDALAL DAS AND OTHERS.*

CIVIL.

1947.

April, 28.
May, 1.

Code of Civil Procedure (Act V of 1908), order 21 rule 100, application under, rejected—Suit filed under order 21 rule 103—Previous possession proved but title to entire suit land not established—Plaintiff, if entitled to possession of the entire suit land—Specific Relief Act (I of 1877), section 9

The plaintiff in a suit can only succeed on the strength of his own title and not on the weakness of the title of the defendant :

*Appeal from Appellate Decree No. 27 of 1943, against the decree of G. M. Chatterjee Esq., Subordinate Judge, Asansol of Zillah Burdwan, dated the 18th June, 1942, reversing the decree of Abdul Quasem Esq., Munsiff, and Court of Asansol, dated the 19th February, 1941.

Jagadis Narain v. Nawab Said Ahmed (1) followed.

Plaintiff's exclusive and peaceful possession for a long time gives rise to an inference of his title against a trespasser and entitles him to a decree for possession against a trespasser but if his possession be merely that of a co-sharer it is quite meaningless to say that he was in possession of a share greater than that to which he is entitled and mere previous possession will not entitle a plaintiff to a decree for recovery of possession except in a suit under section 9 of the Specific Relief Act.

Banku Behari Christian v. Raj Chandra Pal (2); *Satish Chandra De v. Madan Mohan Jais* (3); *Kiron Chandra Roy v. Prasanna Kumar Chikravarty* (4); *Naresh Chandra Basu v. Hyder Sheikh Khan* (5); *Joggepal Sinks v. Prebedh Chandra Bhattacharjee* (6) and *Mussumat Sunderi's case* (7) discussed and reviewed.

Though in the summary proceedings under order 21 rules 98, 99 and 101 the enquiry is directed to scope of possession, a suit under order 21 rule 103 is based on the right to possession and not on mere possession at the relevant date.

Unni Moldin v. Peohar (8) and *Syed Abdul Hakim v. Mangal Chand* (9) referred to.

A suit under order 21 rule 103 Civil Procedure Code is not akin to a suit under section 9 of the Specific Relief Act and the plaintiffs in a suit under order 21 rule 103 cannot succeed by merely showing that they were in possession and had been dispossessed and they must establish their right to possession on the assumption that they were not in possession on the date of the order under rules 98, 99 and 101.

Muralidhar v. Jainti Prasad (10) approved.

Appeal by Plaintiff.

Suit under order 21 rule 103 of the Civil Procedure Code, for declaration of Nishkar title, for Khas possession and for permanent injunction.

Messrs. Bankim Chandra Mukherjee and Muktipada Chatterjee for the Appellant.

Mr. Jagadish Chandra Ghose for the Respondent.

C. A. V.

(1) (1945) 50 C. W. N. 477 (P. C.); 81 C. L. J. 197.

(2) (1909) 14 C. W. N. 141.

(3) (1930) I. L. R. 58 Cal. 29.

(4) (1933) 38 C. W. N. 435; 11 L. R. 61 Cal. 419.

(5) (1928) 49 C. L. J. 83.

(6) (1935) 40 C. W. N. 81.

(7) (1889) L. R. 16 I. A. 186.

(8) (1920) I. L. R. 44 Mad. 227.

(9) (1937) L. L. R. 17 Pat. 164.

(10) (1932) L. L. R. (1932) All. 703.

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May, 1.

The following judgment was delivered:

Das, J. :—This is an appeal by the plaintiff against the judgment and decree of the Subordinate Judge, Asansol, District Burdwan.

Briefly stated, the plaintiff's case is that the disputed property belonged to Kamaruddin Molla who sold the same to plaintiff's father on 6th March, 1933 and on 17th November, 1938.

Defendant No. 1 purchased the disputed property in T. Execution Case No. 103 of 1938 against the heirs of Kamaruddin. The plaintiff having been dispossessed on 8th November, 1939 by defendant No. 1 at the time of taking possession in the said Execution case, the plaintiff filed an application under 21 rule 100 Code of Civil Procedure which was dismissed on 13th May, 1939. The plaintiff accordingly filed the suit for declaration of the plaintiff's Nishkar right in the suit land, for Khas possession on demolition of the huts erected by defendant and for permanent injunction.

The suit was contested by defendant No. 1 mainly on the ground that the plaintiff's Kobala was a Benami transaction, that the plaintiff or his father had no possession, that the Province of Bengal who had got the disputed land sold for non-payment of court-fees, and at which defendant No. 1 purchased, was a necessary party.

The trial Court held that the property belonged to Enayet Ali father of Kamaruddin, that the plaintiff's father's purchase from Kamaruddin was not a Benami one, and this purchase being prior to that of the defendant No. 1, the latter did not acquire any title by his auction-purchase of the interests of Kamaruddin's heirs, the judgment-debtor having no saleable interest at the time; that the plaintiff and his father were in exclusive possession, the other heirs of Enayetulla did not claim any title or possession, that the plaintiff was dispossessed on 8th November, 1939, that the defendant No. 1 was estopped from challenging the exclusive title and possession to the plaintiff. In the result the plaintiff's suit was decreed in full.

The defendant No. 1 preferred an appeal.

The lower appellate Court found that the disputed property belonged to Enayetulla, and on Enayetulla's death, devolved on his son Kamaruddin, his widow Nabijan and his daughter Shajadi; that the shares of Nabijan and Shajadi were not lost by adverse possession, the possession of Kamaruddin was possession on behalf of Nabijan and Shajadi, Kamaruddin's share which was 7/12th had passed to the plaintiff's father by his purchase in 1933 which was

not a Benami one, that as the plaintiff was suing for Khas possession, he can succeed only on the strength of his title, that no question of estoppel arose. In the result, the appeal was allowed in part, the plaintiff's title to the extent of 7/12th share of the suit land was declared and the plaintiff was directed to get joint possession with the defendant and the rest of the prayers was disallowed. Plaintiff was awarded 7/12th share of the costs of the suit, defendant No. 1 was allowed 5/12th cost of the appeal, which was to be set up.

The plaintiff has appealed to this Court.

Mr. Bankim Chandra Mukherjee appearing on behalf of the appellant contends that the lower appellate Court has made a new case of title being with Enayetulla. He next contends that as the plaintiff and his father were in possession of the whole of the disputed lands for a long time the plaintiff is entitled to a decree for the whole even though his title extends to 7/12th share, the defendant being a trespasser. He further contends that the suit being one under order 21, rule 103 Civil Procedure Code, he can succeed on proof of his possession at the date of alleged dispossession as the dispossessor was a mere trespasser, the plaintiff having some title.

I shall deal seriatim with these contentions. As regards the first contention, Mr. Mukherjee refers to a passage in the judgment of the trial Court to the following effect: "From the pleadings of the parties it is almost an admitted case that the disputed property did belong to Kamaruddin Molla." I do not think, the Munsiff was right in his observation. The defendant No. 1 traversed the title and possession of the plaintiff and of Kamaruddin. An issue was joined on the following terms: "Has the plaintiff any right, title or interest in the disputed properties". In the case of *Jagadis Narain v. Nawab Said Ahmed Khan* (1) their Lordships of the Judicial Committee held that a plaintiff suing in ejectment can only succeed on the strength of his own title. There is no obligation on the defendant to plead possible defects in that title.

It is sufficient that in the written statement the plaintiff's title is denied. This contention therefore fails.

The second contention, in my opinion, is also not sustainable. It is opposed to the settled view of our Court. Mr. Mukherjee has relied on the decisions in *Banku Behari Christian v. Raj*

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(1) (1945) 50 C. W. N. 477 (P. C.); 81 C. L. J. 107.

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Chandra Pal (1) ; *Satish Chandra De v. Madan Mohan Jais* (2) ; *Kiron Chandra Roy v. Prasanna Kumar Chakravarty* (3) and has argued that as his vendor Kamaruddin obtained exclusive possession of the whole and as the plaintiff's father and then the plaintiff were in such possession, though short of the statutory period of 12 years, nevertheless he can successfully maintain an ejectment against the defendant No. 1 who is a mere trespasser.

In the present case, the plaintiff prayed for declaration of his exclusive title and for recovery of Khas possession on an allegation of dispossession and for demolition of the structures erected by the defendant No. 1 after he took possession. In my opinion, the plaintiff in the suit as framed, can succeed only on the strength of his title and not on the weakness of the defence. I shall now deal with the above cases.

In the case of *Banku Behari Christian v. Raj Chandra Pal* (1), the plaintiffs had failed to prove the Mokarari title set up by them, but had proved their tenancy right by possession on payment of rent. This was held to be sufficient to maintain a suit for recovery of possession against the defendants who were trespassers. It is apparent that the title proved by the plaintiffs was exclusive and entitled them to possess the whole of the land. The general observation made at page 143 must be read in the light of the facts of the case. In the case of *Satish Chandra De v. Madan Mohan Jais* (2), which was decided by Page, J. sitting singly, his Lordship held that the right of the plaintiff to eject the defendants did not rest merely on bare and unexplained prior possession but that the possession of the plaintiff was by virtue of a title derived from the maliks of the lands which gave them a right for possession. His Lordship expressly held that it was not necessary for him to consider whether a cosharer can eject a trespasser from the entirety of the premises. The wide statement of the law in the early part of the judgment was obiter. The case of *Kiron Chandra Roy v. Prasanna Kumar Chakravarty* (3) does not really assist the appellant. After referring to the decisions of the different High Courts their Lordships (Mallik, and Jack, J.J.) observed: "So far as this High Court is concerned, it is well settled by decisions which are binding upon us that mere previous possession will not entitle a plaintiff to a decree for recovery of

(1) (1909) 14 C. W. N. 141.

(2) (1930) I. L. R. 58 Cal. 29.

(3) (1933) 38 C. W. N. 435; I. L. R. 61 Cal. 419.

possession except in a suit under section 9 of the Specific Relief Act." Referring to the decisions in *Bonhu Behari Christian v. Raj Chandra Pal* (1); *Satish Chandra De v. Madan Mohan Jais* (2), which have been relied on by Mr. Mukherjee, their Lordships observed that "in all these cases previous peaceful possession for a long time gave rise to an inference of title in the plaintiff as against a trespasser and entitled him to a decree for possession against a trespasser who had no right whatsoever to possession. In the present case, the finding of the Court of appeal below is that the possession of Kamaruddin was not exclusive but was on behalf of himself and his co-sharers viz., his mother and sister. The view taken in the case last cited has been applied to the case of a co sharer seeking recovery of possession of the whole of the property, in the case of *Narash Chandra Basu v. Hyder Sheshik Khan* (3), a decision of D. N. Mitter, J sitting singly which was affirmed in Letters Patent Appeal No. 104 of 1928. The view taken by Mitter, J. was reaffirmed in the case of *Joygopal Sinha v. Probodh Chandra Bhattacharjee* (4) which was also a case of co-sharer seeking to recover possession of the whole. At page 83, Nasim Ali, J. observed as follows:— "In the second place, *Musammatt Sundarl's* case (5) is not an authority for the proposition that where a person brings a suit for ejecting a trespasser and is not defending his possession, he can eject the trespasser from the whole of the land. If a person has entered into possession lawfully and peaceably and if his possession is attempted to be disturbed by a person who has no title, he can maintain his possession by an injunction from the Court, if, however, he is dispossessed and does not sue for possession under section 9 of the Specific Relief Act, he can only succeed on the strength of his own title". Mr. Justice Henderson who concurred in the decision went on to state that: "In the second place, the previous possession of the plaintiffs was merely that of co-sharer and it is quite meaningless to say that they were in possession of a share greater than that to which they were entitled." The second contention therefore fails. As regards the third contention, I have pointed out that the suit is not strictly in terms of order 21 rule 103 Civil Procedure Code. But assuming that it is so, I think the plain

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(1) (1909) 14 C. W. N. 141.

(2) (1930) I. L. R. 58 Cal. 29.

(3) (1928) 49 C. L. J. 83.

(4) (1935) 40 C. W. N. 81.

(5) (1889) L. R. 16 I. A. 186.

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words of the rule negative this contention. A suit under the rule is expressed to be a suit "to establish the right which he (plaintiff) claims to the present possession of the property." It is a suit based on the right to possession and not on mere possession at the relevant date. It is true that in the summary proceedings under order 21 rules 98, 99, 101 Civil Procedure Code the inquiry is directed to question of possession but the scope of the suit under rule 103 is much wider. This view is fully supported by the decisions in *Unni Moidin v. Peohar* (1) and *Syed Abdul Hakim v. Mangal Chand* (2). It has been held in the case of *Muralidhar v. Jainati Prosad* (3), that a suit under order 21 rule 103 Civil Procedure Code is not akin to a suit under section 9 of the Specific Relief Act and the plaintiffs in a suit under order 21 rule 103 Civil Procedure Code cannot succeed by merely showing that they were in possession and had been dispossessed, they must establish their right to possession on the assumption that they were not in possession on the date of the order under rules 98, 99, 101. This contention also fails.

In the above view, it is not necessary to deal with the contention raised by Mr. Jagadish Chandra Ghosh appearing for the respondent that the Province of Bengal who was in substance the decree holder at whose instance the sale at which the defendant No. 1 purchased was held, was necessary party to the suit under order 21 rule 103 Code of Civil Procedure.

The appeal accordingly fails and must be dismissed with costs.

S. K. B. ; S. C.

Appeal dismissed.

(1) (1920) I. L. R. 44 Mad. 227.

(2) (1937) I. L. R. 17 Pat. 164.

(3) (1932) I. L. R. (1932) All. 703.

Before Mr. Justice R. C. Mitter and Mr. Justice
Amiruddin Ahmad.

GOSTHA BEHARI DE

v.

PURNA CHANDRA DE AND OTHERS.*

Civil.

1947.

April, 24, 25,
28 & 29.

Hindu Law—Debottar—Shebait—Managing shebait of a family deity granting lease for legal necessity to some of the other shebait—Leases sold their interest to the plaintiff—Plaintiff dispossessed by the new lessee of the village committee who claimed the deity as village deity—Former lease, if valid—Managing shebait, powers of, if like a trustee—Died of dedication, if can confer larger powers—Remand on the points vis., (1) whether the managing shebait in a particular institution had power of granting leases and (2) whether, on evidence, there was legal necessity—Decisions thereon, if questions of fact and if can be challenged in second appeal—The question of the validity or otherwise of the said lease, if should be allowed to be raised for the first time in appellate Court, when it was not raised nor any issue framed thereon in trial Court.

Although shebait is not strictly trustee, yet the same principles which are applicable to trustees are applicable to shebait in the matter of alienations and bringing of suits.

Kohlarwari Dasi's case (1); *Raja Peary Mohan Mukherjee v. Mencher Mukherjee* (2) and the principles laid down in *Huddersfield Banking Company v. Henry Lister & Son* (3) referred to.

Ordinarily a managing shebait has the powers of management only i. e., to manage the worship and carry on the day to day administration of the affairs of the Deity but in a particular deed of dedication he may be given larger powers and there would be nothing illegal in it.

When a case is remanded to the lower Court on the points vis., whether the managing shebait in a particular institution had power of granting leases and whether on evidence there was legal necessity for the same, the decision thereon was on questions of fact and cannot be challenged in second appeal.

The question vis. whether the lease granted by the managing shebait to some of the other shebait is valid or not should not be allowed to be raised for the first time in appellate Court when it was not raised nor any issue framed thereon in trial Court.

*Letters Patent Appeal No. 24 of 1944, against the judgment of Mr. Justice R. F. Lodge, dated the 10th August, 1944 in Appeal from Appellate Decree No. 58 of 1943.

(1) (1906) 5 C. L. J. 527.

(2) (1921) L. R. 48 L. A. 258; I. L. R. 48 Calc. 1019; 34 C. L. J. 86.

(3) (1895) 2 Ch. 273.

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A trustee can buy from *cestui que trust* but such a purchase would not be upheld by the Court unless the purchaser trustee shows, and the onus is on him, that he did not take advantage of his position as trustee and made the fullest disclosure at the time of the bargain and questions of fact would necessarily arise in such cases.

Appeal by Plaintiff under section 15 of Letters Patent.

Suit for declaration of title, for possession and for mesne profits.

The material facts appear from the judgment.

Messrs. Hira Lal Chakravarty and *Shyamadas Bhattacharjya* for the Appellant.

Mr. Apurbadhan Mukherjee for the Respondents.

C. A. V.

April, 29.

The judgment of the Court was as follows :—

The subject-matter of the suit in which the appeal arises is a tank belonging to Deity, Sri Sri Bishalakshi Thakurani. In 1907 one Abhoy Charan De purporting to act as a managing sebaite granted a mourasi mokorari lease of the said tank to four persons, Annada Prosad De and others at a rental of Rs. 15 per year. Abhoy Charan De died in 1910 when another person became the managing sebaite. In 1916 the original leasees, Annada and others, or their heirs as the case may be sold their leasehold interest to Gostha Behari De, the plaintiff in the suit. In 1932 the villagers of the village claimed the Deity to be a village Deity and appointed a committee to look after the affairs of the said deity. Two members of the Committee let out the said tank to defendant No. 34.

It is the plaintiff's case that in 1934 he was dispossessed by defendant No. 34 aided by the members of the said committee. In 1936 he instituted the suit for declaration of his title as a mokorari mourasi tenant of the said tank, for possession and for mesne profits.

One of the defences raised in the suit was that the Deity was a village Deity. That defence was negatived and it was found that the Deity was a family Deity of the Deys of that village. That defence has not been repeated either before us or before our learned brother Mr. Justice Lodge,

The suit had a chequered history. The learned Munsiff decreed the suit in part by making a declaration of title in favour of the plaintiff and giving him possession. But no decree was given for mesne profits. An appeal from his decree was heard by

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Purna Chandra De,

Mr. Roxburgh, as he then was, who affirmed the decree of the trial Court. There was a second appeal to this Court by some of the defendants being Special Appeal No. 1553 of 1937. It was heard by Mr. Justice Sen, who set aside the decision of Mr. Roxburgh, as he then was, and remanded the case to the lower appellate Court giving specific directions regarding two points. He asked the lower appellate Court to record findings on the question as to whether there was a legal necessity for granting the lease which Abhoy gave in the year 1907 to Annada and others; and (2) whether Abhoy as managing sebaits of the Deity had the power to grant the lease.

The learned Subordinate Judge of Howrah heard the matter after remand. He came to the conclusion that there was legal necessity for the said lease; that Abhoy was the managing sebaits, and had as such the power to grant leases without the concurrence or consent of the other sebaits.

Against the judgment and decree of the learned Subordinate Judge some of the defendants preferred an appeal to this Court being second appeal No. 58 of 1943. That appeal was heard by our learned brother Mr. Justice Lodge, who allowed the appeal, but at the same time granted leave to file an appeal under the Letters Patent. The Letters Patent appeal was filed. It is No. 24 of 1944, which is now before us.

Mr. Justice Lodge agreed with the lower appellate Court that there was legal necessity for the lease. He repelled the argument of the appellants to the effect that the lease was void inasmuch as all the sebaits had not granted the same. But he allowed the appeal on two grounds. First, that the lease granted by Abhoy alone was invalid inasmuch as in law a trustee cannot delegate his powers to a co-trustee in any matter concerning the trust estate and that principle was applicable to sebaits. The second ground on which he allowed the appeal was that the lease could not be upheld because the lessees were some of the sebaits of the Idol. For the reasons hereinafter appearing, we cannot agree with our learned brother Mr. Justice Lodge.

In the plaint the plaintiff stated that Abhoy Charan De, who had granted the lease in the year 1907 was the managing sebaits and that in this institution the managing sebaits had the power to grant leases.

The case of the plaintiff was not that Abhoy Charan De was exercising the powers delegated to him by the other co-sebaits in the matter of the lease. The first ground on which the

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second appeal was allowed cannot, therefore, in our judgment be sustained.

We have already stated that our learned brother Mr. Justice Lodge held that where there are several trustees, it is not the law that all must join when a trust estate or a part thereof was being alienated.

Although sebaits are not strictly trustees, it has been held in a series of cases that the same principles, which are applicable to trustees, are applicable to sebaits in the matter of alienations and bringing of suits and one of those principles is that where there are several trustees all of them must act together. We need not refer to the several cases on the point. They proceed upon the principle that had been laid down in *Huddersfield Banking Company v. Henry Lister & Son* (1). Nearly all the cases are reviewed in *Kokilaswari Das's* case (2).

The second proposition is that a managing sebit has ordinarily the powers of management only, that is to say, to manage the worship and carry on the day to day administration of the affairs of the Deity.

But in a particular debattar, the managing sebit may have larger powers. For instance, the deed of dedication itself may give him larger powers and by its terms define those powers, and if it did there would be nothing illegal in it.

When the appeal came on for hearing before Mr. Roxburgh, as the additional District Judge of Howrah he did not enter into the question as to whether Abhoy had the power to grant the lease without the consent or the concurrence of his co-sebaits. Our learned brother Mr. Justice Sen pointed out that the mere fact that a person was a managing sebit would not necessarily give him the power to alienate the debattar property by way of sale, mortgage or lease. He remanded the case with the express direction to the lower appellate Court to find out as to whether in this institution the managing sebit had the power to grant leases. The learned Subordinate Judge after remand reviewed the evidence and came to the conclusion that Abhoy as the managing sebit had the power to grant the lease. Mr. Justice Sen's judgment clearly indicated that that question is to be investigated on the facts of this case and the learned Subordinate Judge came to that conclusion after discussing the evidence. The question, therefore, was a question

(1) (1895) 2 Ch. 273.

(2) (1906) 5 C. L. J. 597.

of fact and was treated as a question of fact. In second appeal that finding can only be revised if it be found that there is either no evidence in support thereof or it is based on evidence which is inadmissible in law. We have gone carefully through the judgment of the learned Subordinate Judge after remand and the evidence has been placed before us in some detail. We cannot say either that that finding is based on no evidence, or that the learned Subordinate Judge had relied upon evidence which is inadmissible in law. The finding of the learned Subordinate Judge that Abhoy had as managing sebaite the power to grant the lease is a finding of fact which was not open to revision in second appeal.

The next question is the question of legal necessity. On this point also there is a finding of fact based on evidence. The learned Advocate appearing for the defendants respondents has urged that in arriving at his finding the learned Subordinate Judge misconceived the evidence of defendants' witness No. 7. We cannot agree with that contention. The plaintiff's case of legal necessity is that the endowment had very little income. Money was required for the purposes of paying the debts incurred on account of a litigation which the Deity had with a third party and for re-excavating the tank. In support of his case he led oral evidence and also put in an old Furd, exhibit 6. The effect of the oral evidence and of the Furd is that the Selami which was obtained on the grant of the lease of 1907 was utilised for those two purposes. The learned Subordinate Judge laid great emphasis upon exhibit 6, which he found to be a genuine document. Defendant's witness No. 7 stated in his evidence that the debattar had very little income, that the tank was re-excavated twice, once in the year 1896 and another about the year 1926 or so, ten or twelve years before his deposition. He did not admit the re-excavation about the time of the lease. Having made the statement that there was no appreciable income of the debattar estate he said that for the purposes of meeting the costs of the re-excavation money was raised; and the case that he made was that for the re-excavation, which was made forty years back, that is to say, in the year 1896, money was raised on a usufructuary mortgage from one Bhutnath, who repaid himself by taking the usufruct of the tank for about twelve years. The cross-examination of this witness makes it quite clear that he was very unfriendly to the plaintiff. He admits a crop of criminal cases between him and the plaintiff, or between others and the plaintiff in which he deposed for the plaintiff's opponents and all those cases resulted in the acquittal of the plaintiff. The learned Subordinate

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Judge's language when dealing with the evidence of this witness is a little unhappy. But what the learned Subordinate Judge meant to say was that as the debattar property had little income, money had to be raised for re-excavating the tank, that the tank was in fact re-excavated, but he could not believe that part of the statement of the said witness which implied that the tank was not re-excavated about the year 1907 but ten years earlier and not with the money which was the Selami of the questioned lease, but with the money advanced by Bhutnath on a usufructuary mortgage. The finding of the learned Subordinate Judge after remand that the lease was for legal necessity is a finding which is not open to revision in second appeal. In fact Mr. Justice Lodge refused to revise that finding, but the respondents before us asked us to revise the finding on the ground that the learned Subordinate Judge misread the evidence of defendant's witness No. 7 although in arriving at his finding the learned Subordinate Judge relied upon other evidence the credibility of which cannot be challenged in second appeal.

We will now have to deal with the second reason on which Mr. Justice Lodge allowed the appeal. That reason is that as the lessees were themselves some of the sebaits the lease itself was invalid. In the written statement this defence was not specifically taken but a vague statement was made. The statement is that the lessees had not the legal capacity to take the lease. No issue was raised at the trial Court and there was no discussion of this point before it.

The point was first formulated in appeal in a definite shape before Mr. Roxburgh, as he then was, who noticed it but overruled the same. The defendants preferred the second appeal which was heard by our learned brother Mr. Justice Sen. It does not appear from his judgment that the point was seriously pressed before him because there was no indication given in his judgment. But we are not giving any weight to the fact that the point does not appear in the judgment of our learned brother Mr. Justice Sen. We think that the point ought not to have been allowed to be raised at the appellate stage either before Mr. Roxburgh, as he then was, or before Mr. Justice Lodge who decided the second appeal. The principles which govern alienations by trustees are applicable to alienations by sebaits. That proposition is now settled beyond doubt by the decision of the Judicial Committee in the case of *Raja Peary Mohan Mukherji v. Monohar Mukherji* (1). It is

(1) (1921) L. R. 48 I. A. 258; I. L. R. 48 Calc. 1019; 34 C. L. J. 86.

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therefore necessary to examine those principles. The sale by a trustee for sale to himself or to a Benamdar of his is absolutely invalid. The reason being that a man cannot both be the vendor and the purchaser. But in other cases there is no absolute bar to a purchase by a trustee. A trustee can buy from the cestui que trust. There is no absolute bar but such a purchase would not be upheld by the Court unless the purchaser trustee shows, and the onus is on him, that he did not take advantage of his position as trustee and made the fullest disclosure at the time of the bargain. A trustee cannot also place himself in such a position where there may be a possibility of conflict between his interest and his duty. Such being the law, questions of fact would necessarily enter into the picture where a purchase by a trustee other than a trustee for sale is challenged. If the case is to be regarded as a case of purchase by a trustee from the cestui que trust the purchaser trustee should have the opportunity to show that he made full disclosure and dealt with the transferor (the managing trustee) at arm's length.

Even for the purposes of showing that there was a possibility of conflict of interest and duty it may be necessary to investigate facts.

We are accordingly of opinion that this ground on which the judgment of Mr. Justice Lodge was rested ought not to have been allowed to be raised at the appellate stage, seeing that if the ground had been taken in that specific form in the Court of first instance there might have been an answer by the plaintiff on facts.

We accordingly allow this appeal and restore the judgment and decree of the trial Court. The plaintiff will be entitled to costs throughout.

S. K. B. ; S. C.

Appeal allowed.

Judgment and decree of trial Court restored.

Before Mr. Justice R. F. Lodge and Mr. Justice
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Lien—Salvage Lien—Putni Regulation (VIII of 1819), section 13 cl (4) deposit by darpatnidar under, if creates a salvage lien i. e., a first charge—Darpatnidar takes over possession under section 13 cl (4)—Further relief on basis of salvage lien, if can be allowed—Election—Bengal Tenancy Act (VIII of 1885), section 171—Rent, a first charge—Section 195, if affects the rights and incidents of putni tenures governed by previous enactments in force—The words "salvage lien" used in Privy Council decision in A. H. Forbes v. Maharaj Bahadur Singh (1), if gives mere description of the lien or carries the actual incidents attached to it—Darpatnidar's deposit, if creates a salvage lien independently of section 13 cl (4) of Regulation VIII of 1819—Sale of Land for Revenue Arrears Act (I of 1845), section 9, deposit under, if creates such lien—Excess Profits Tax Act (XV of 1940), section 7, effect of—Transfer of Property Act (IV of 1882), sections 59A, 72—Darpatnidar, if entitled to add the amounts of his subsequent payments to the original deposit by him—The order in which the disbursement of receipts of rent is to be made by the depositor darpatnidar in possession.

The deposit made by Darpatnidar under section 13 cl (4) of Regulation VIII of 1819 created a lien but not a salvage lien i. e., a first charge having priority over the pulse mortgagees.

A. H. Forbes v. Maharaj Bahadur Singh (1) distinguished.

Ramjibon Bhadra v. Tasuddin Kari (2) approved.

A darpatnidar making such a deposit would have to elect whether to claim relief provided by the Regulation or that in the nature of salvage lien such as given by section 171 of the Bengal Tenancy Act; but once he elects to claim relief under the Regulation by taking possession of the putni tenure he cannot claim the other relief also.

Rent which would be a charge prior to most other charges under section 171 of the Bengal Tenancy Act would not have priority over darpatnidar's lien under section 195 of the said Act which provided that nothing in the Act should affect any enactment, previous to it, relating to putni tenures so far as it relates to those tenures.

* Appeal from Original Decree No. 53 of 1941, with three sets of Cross objections, against the decree of J. N. Basu Roy, Esq., Subordinate Judge of District Nadia, dated the 30th September, 1940.

(1) (1914) L. R. 41 I. A. 91 P. C. 1; I. L. R. 41 Cal. 926; 25 C. L. J. 434.

(2) (1911) 15 G. W. N. 404.

A. H. Forbes v. Maharaj Bahadur Singh (1) followed.

The words "salvage lien" used in the Privy Council decision in *A. H. Forbes v. Maharaj Bahadur Singh* (1) were used merely as descriptive of the right and do not carry all the incidents attached to it known to Maritime Law or to the Irish Courts.

No "salvage lien" independent of statute was created by the darpatnidar making a deposit. It follows therefore that the darpatnidar merely obtained a lien which would be postponed to all the prior mortgagees.

Kinn Ram Das v. Mesaffar Hossain Saha (2) followed.

Nugenderchunder Ghose v. Sreemates Kaminee Dosses (3) and *Menekar Das Mohanta v. Hasari Mull* (4) relied on.

A mortgagee making deposit under section 9 of Act I of 1845 of arrears of government revenue and thereby preventing the estate from being sold for arrears can recover the same with interest from the proprietor but no equitable lien on the estate is created thereby.

Nugenderchunder Ghose v. Sreemates Kaminee Dosses (3) relied on.

Though section 7 of Bengal Act XV of 1940, in effect, amended section 13 of the Regulation VIII of 1819 by adding two clauses providing for "salvage lien" of the nature of that provided by section 171 of the Bengal Tenancy Act, yet it does not follow that the legislature regarded the original section as giving to the darpatnidars rights as extensive as those conferred by the amendment on other persons whose interests are affected.

The darpatnidar is entitled under section 72 of the Transfer of Property Act to add the subsequent payments to his original deposit.

Bihari Lal Biswas v. Nasimannessa Bibi (5) dissonated from.

The mortgagee in possession can spend the income in any way agreed upon between him and the mortgagor provided the securities of the prior mortgagees are not thereby imperilled.

The darpatnidar making the deposit under section 13 cl (4) of Regulation VIII of 1819 should disburse the amount of rent received in the following order:—

- (1) payment of expenses of collection,
- (2) payment of patni rent to zemindar,
- (3) purchaser of subordinate tenures, if requested to do so by the patnidar,
- (4) liquidation of his claims against the patnidar for advance made subsequent to his original deposit, and
- (5) payments towards the original deposit.

(1) (1913) L. R. 41 L. A. 91 P. C. ; 1 L. R. 41 Calo. 926 ; 25 C. L. J. 434.

(2) (1887) I. L. R. 14 Calo. 809 F. B.

(3) (1867) 11 Moo. I. A. 241 P. C.

(4) (1931) L. R. 58 I. A. 341 P. C. ; 54 C. L. J. 125.

(5) (1917) 27 C. L. J. 480.

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Appeal by Defendant No. 8.

Cross-objection on behalf of the Respondents Surput Sing, Mahiput Sing and Bhuput Sing under Order 41 Rule 22 of Civil Procedure Code.

Cross-objection on behalf of Maya Debi for self and as heiress of Debnandan Mukhopadhyay under Order 41 Rule 22 read with Order 42 Rule 1 of Civil Procedure Code.

Cross-objection on behalf of Respondent Saradindu Mukhopadhyay under Order 41 Rule 22.

Suit for realisation of mortgage dues and other reliefs.

The material facts will appear from the judgment.

Messrs. Atul Chandra Gupta, Jitendra Kumar Sen Gupta and Jnanendra Nath Mukherjee for the Appellant.

Messrs. Rajendra Bhusan Bakshi, Amal Kumar Mukherjee and Sushil Kumar Biswas for the Respondent No. 1.

Mr. Apurbadhan Mukherjee for the Respondent Nos. 3 to 5.

Dr. N. C. Sen Gupta, Messrs. Amarendra Nath Bose, Gour Mohon Dutt and Satya Charan Pain for the Respondent No. 6.

Mr. Sushil Kumar Bismas for the Added Respondent.

The following judgment was delivered :

December, 18.

Lodge, J. :—This is an appeal against the judgment and decree of the Subordinate Judge Nadia in a suit on a mortgage.

The material facts are not in dispute. On the 18th September, 1916, Maharaja Kshounish Chandra Ray Bahadur and Satyendra Narayan Bagchi, Executors to the estate of Saratmani Devi deceased executed a mortgage deed in respect of the patni taluk Lot Plassey in consideration of a loan of Rs. 25000 which was to carry interest at the rate of 12 annas per cent. per month until realisation. Under this patni taluq were a number of subordinate tenures, two of which were dar-patnis held by the Midnapore Zemindary Company.

In 1927, the executors to the estate of the late Saratmani Devi, made over the estate to Deb Nandan Mukhopadhyay, who was in control of the estate until 8th August, 1930, when he executed a deed of trust in favour of Srimati Maya Devi. Deb

Nandan borrowed Rs. 60,000 from Surput Sing, Mahiput Sing and Bhuput Sing on 27th June, 1928, and mortgaged the same properties for the second time. Again, on 8th October, 1929, Deb Nandan borrowed Rs. 30,000 from Bepin Behari Laha and executed a third mortgage in respect of the same properties.

Thereafter in 1930, DebNandan defaulted in payment of rent to the superior zemindar, and the taluk was advertised for sale under the provisions of Regulation VIII of 1819. The Midnapore Zemindary Company, being talukdars of the second degree in respect of their two dar-taluks paid into Court the amount declared due, viz., Rs. 22,974 odd and stayed the final sale. The Midnapore Zemindary Company applied to be put in possession of the taluk under the provisions of section 13 (Fourth) of Regulation VIII of 1819, and possession was given to them by the Collector on 26th November, 1930. The Midnapore Zemindary Co., remained in possession of the taluk from that date until after institution of the present suit.

After taking possession of the property the Midnapore Zemindary Company addressed letters to Srimati Maya Debi, asking for instructions in case the receipts from the taluk should be found insufficient to pay the head rent to the superior zemindary. Answers to the letters were received, though these answers were not signed by Srimati Maya Devi herself, and these answers authorised the Midnapore Zemindary Company to advance the money necessary to pay the head rents and to charge 12 p. c. interest on the advances. In one such letter, which was signed by DebNandan, the Midnapore Zemindary Company were requested to buy in auction sale, other darpatnis held under the taluk, in respect of which decrees for arrears of rent had been obtained. Accordingly it is the case of the Midnapore Zemindary Company, the Company in those years in which the realisations were insufficient to pay the head rents advanced the amount necessary for this purpose; and also, on occasions spent money from the receipts in purchasing other darpatnis held under the patni taluk, when the said darpatnis were put to sale in execution of decrees for arrears of rent.

In these circumstances the suit out of which this appeal arises was instituted by the first mortgagee, Saradindu Mukhopadhyaya.

DebNandan, successor of the mortgagors, was made defendant No. 1; the second mortgagees were made defendants 2, 3, & 4, the third mortgagee was made defendant No. 5; Srimati Maya Debi was made defendants No. 7; and the Midnapore Zemindary

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Company was made defendant No. 8. Defendant No. 6 was a fourth mortgagee who compromised with the plaintiff and does not concern us further.

The plaintiff alleged in para 7 of the plaint that the amount due to the Midnapore Zemindary Company had been satisfied out of the usufruct.

Written statements were filed by defendant No. 1, by defendants Nos. 2 to 4 and by defendant No. 8.

Defendant No. 8 in his written statement, asserted that his original deposit had not been satisfied from the income of the estate; that on the contrary he had advanced further sums to pay the head rents; and that he had a statutory mortgage lien on the property in respect of the deposit and of these advances; and he contended that the plaintiff and the puisne mortgagees were not entitled to any relief against him, or to put the mortgaged property to sale without first satisfying his claims.

Issues were framed.

Issue No. 11 reads:

What is the legal position of the defendant No. 8 so far as the plaintiff is concerned? Can the defendant No. 8 claim priority over the mortgage of the plaintiff? If so, is defendant No. 8 entitled to priority in respect of the first deposit under section 13 of Regulation VIII of 1819 or is it also entitled to priority in respect of subsequent advances, if any? And issue No. 13 reads;

Has the sum deposited by the defendant No. 8 under section 13 of Regulation VIII of 1819 been paid off as alleged by the plaintiff? Have the legal dues of the defendant No. 8 not been paid off as alleged?

On Issue No. 13, the learned Subordinate Judge found that the sum deposited under section 13 of the Regulation and the legal dues of defendant No. 8 had not been paid off.

On issue No. 11 the learned Subordinate Judge held that the defendant No. 8 did not acquire a first charge on the patni taluk by virtue of his deposit under section 13 of Regulation VIII; and that the defendant No. 8 could not claim any priority over the plaintiff and the puisne mortgagees in respect of the advances made by him in order to pay the headrent. The learned Subordinate Judge accordingly decreed the suit against defendants Nos. 1 to 5 and 7 and 8, determined the amount due to the plaintiff under his mortgage and directed defendants Nos. 1 to 5 and 7 and 8 to pay the amount due in four instalments and ordered that in default

of such payments, the mortgaged property be sold. The learned Subordinate Judge did not determine the amounts due to defendant No. 2 or to the puisne mortgagees. Defendant No. 8 has appealed.

Mr. Gupta for the appellant contended—

1. that the lien acquired by the appellant by his deposit under section 13 of Regulation VIII takes precedence over all other mortgages ;

2. that subsequent advances by defendant No. 8 to pay the head rents and to preserve the estate for the benefit of all, also take precedence over all other mortgages.

Mr. Gupta also contended that the appellant after taking possession of the taluk was entitled to deal with each year's receipts as follows :—

He was first to deduct the expenses of collection ; from the balance he was to pay as far as possible the head rent due to the zemindar ; from the balance if any he was entitled to purchase subordinate tenures at the request of the patnidar ; from the balance after these payments, he was entitled first to recoup himself for any advances made in order to pay the head rent to the zemindar and then to pay off the original deposit under section 13.

Mr. Gupta also contended that the dues of the appellant should have been ascertained and a decree passed either in form No. 9 or form No. 10 of Appendix D to the Civil Procedure Code. The plaintiff filed a cross-objection, claiming that the amount due was larger than that allowed in the decree.

That cross-objection has not been pressed. A cross-objection by the successors of the mortgagor was filed in which it was urged that the Court should have ascertained the dues of the puisne mortgagees and of defendant No. 8. Another cross-objection was filed by defendants Nos. 2, 3, and 4 in which they questioned the Subordinate Judge's findings on issues No. 13 and urged that defendant No. 8 had acquired no charge or lien over the properties in suit.

The first question for our consideration is ;

Does the original deposit under section 13 of Regulation VIII of 1819 take precedence over all other mortgages ?

Mr. Gupta conceded that this Court had held in *Ramjiban Bhadra v. Tasuddin Kasi* (1), that a darpatnidar did not by

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virtue of a deposit under section 13 of Regulation, acquire a first charge on the property ; but he contended that this decision could no longer be regarded as good law or as binding on us in view of the decision in *Arthur Henry Forbes v. Bahadur Singh and others* (1). Mr. Gupta contended that in *Ramjiban Bhadra v. Tasuddin Kasi* (2) two questions were decided namely :—

(a) that section 13 (fourth) of Regulation VIII of 1819 does not create a first charge *i. e.*, a salvage lien, and

(b) that section 13 (fourth) provides two alternative remedies and that election must be made between the two.

He contended that the judgment in *Arthur Henry Forbes v. Bahadur Singh and others* (1) clearly overruled the second of these findings and is inconsistent with the first. It is therefore necessary for us to examine these decisions with some care.

In the case of *Ramjiban Bhadra v. Tasuddin Kasi* (2) the darpatnidar made a deposit and took possession under section 13 of Regulation VIII. He subsequently advanced sums from his own pocket to pay the head rents, but ultimately defaulted and the taluk was sold under the provisions of the Regulation. The purchaser was one who had held a mortgage of the patni, executed by the patnidar at a date prior to the deposit under section 13 of Regulation VIII by the darpatnidar. The darpatnidar sued to recover his dues out of the surplus sale proceeds, claiming that in respect of his original deposit and of his subsequent advances he was entitled to priority over the mortgagee.

This Court held that section 13 (fourth) of Regulation VIII of 1819 does not create a first charge. The Court further held that inasmuch as the Regulation provided a particular relief, it was doubtful whether the darpatnidar could claim another relief by setting up a salvage lien such as that given by section 171 Bengal Tenancy Act, but, that if it was open to a darpatnidar making such a deposit to set up such a salvage lien, he would have to elect whether to claim the relief provided by the Regulation or to claim under the salvage lien. In that case inasmuch as the darpatnidar had availed himself of the relief provided by section 13 of Regulation and had taken possession of the property, he was not entitled to claim relief on the basis of a salvage lien.

Thus the Court decided :—

(a) Section 13 of Regulation VIII does not create a first charge *i. e.*, a salvage lien ;

(1) (1914) L. R. 41 I. A. 91 ; I. L. R. 41 Calc. 926 ; 26 C. L. J. 434.

(2) (1911) 15 C. W. N. 404.

(b) that it was doubtful whether in the case of a deposit by a darpatnidar that any salvage lien was created. The reason given for holding that it was doubtful was that the section provided a remedy which was not a salvage lien ; and

(c) that if a salvage lien was also created by such a deposit, the darpatnidar could not avail himself of that lien, if he availed himself of the special relief provided by section 13 of Regulation VIII.

Arthur Henry Forbes v. Bahadur Singh and others (1), was an appeal from a decision of this Court reported in (*Maharaj Bahadur Singh v. Arthur Henry Forbes*) (2).

The facts of the case were as follows :—

In 1898 Rai Dhanput Singh, owner of a zemindary, transferred that zemindari to Mussammat Bhagwanbati Choudhurani reserving to himself arrears of rent due from patnidars. In 1896 Rai Dhanput Singh obtained a decree for arrears of rent against the patnidar (Chattrapat Singh) in respect of arrears which fell due prior to the transfer in 1893. The patnidar was in arrears with regard to rent of subsequent years, and the zemindar Bhagwanbati Choudhurani took action under Regulation VIII of 1819 and had the patni taluk advertised for sale. Thereupon Forbes, a darpatnidar, made a deposit under section 13 of the Regulation and had the sale stayed. Forbes applied for and obtained possession of the taluk under the provisions of section 13 (fourth). Thereafter another person purchased the patni in execution of a money decree. The representative of Rai Dhanput Singh, the original zemindar sought to execute the decree obtained by him in 1896 against the patnidar and advertised the patni for sale under section 165 Bengal Tenancy Act. Forbes the darpatnidar made an application in execution which was disallowed and then instituted a suit for a declaration that the patni was not liable to be sold in execution of the decree of 1896. The first Court held the decree of 1896 was not decree which could be executed under the provisions of the Bengal Tenancy Act and that Forbes by his deposit under section 13 of Regulation had acquired a first charge on the taluk. The first Court decreed the suit. The representatives of the original zemindar appealed. This Court allowed the appeal holding that the decree of 1896 was a decree for rent and that rent was a first charge on the patni ; that the darpatnidar making a

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(1) (1914) L. R. 41 I. A. 91 ; I. L. R. 41 Calc. 926 ; 25 C. L. J. 434.

(2) (1908) 7 C. L. J. 651 ; I. L. R. 35 Calc. 737

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deposit under section 13 of Regulation has a lien but not a first charge on the patni and that therefore the decree of 1896 was entitled to priority over the darpatnidar's lien. The Judicial Committee held that the right to bring the tenure or holding to sale exists only so long as the relationship of landlord and tenant exists, and that as the original zemindar had parted with the zemindari before he obtained his decree for arrears of rent in 1896, his representative was not entitled under section 65 of the Bengal Tenancy Act to put the holding to sale. In other words the decree of 1896 was a money decree and not a rent decree. But their Lordships added that there was another equally fatal objection to the claim of the representative of the original zemindar. They pointed out that prior to the Bengal Tenancy Act, rent was not a first charge on the tenure or holding, and that it was made a first charge by that Act, which however in section 195 provided that nothing in the Act should affect any enactment relating to patni tenures, so far as it relates to those tenures. Therefore inasmuch as the darpatnidar's lien was created by Regulation VIII, that lien was not affected by the provision in the Bengal Tenancy Act that the rent should be a first charge. In other words, the rent was not a charge having priority over the lien created by section 13 of Regulation VIII of 1819. I am unable to hold that their Lordships in this case decided that the lien acquired by the darpatnidar making a deposit under section 13 of Regulation had priority over any other mortgage. They merely held that rent which would be a charge prior to most other charges would not have priority over the darpatnidar's lien and this, owing to the specific provision of section 195 Bengal Tenancy Act.

Mr. Gupta laid special emphasis on the following paragraph in the judgment of the Privy Council *vis.*, "It will be seen, therefore, that the appellant in this case, by his admitted deposit of the arrears for which the superior tenure was advertised for sale at the instance of the Choudhurani zemindar, acquired the special lien created by the Regulation which may well be called a statutory salvage lien arising not from any implication of the law but under the express directions and declarations of the Act."

Mr. Gupta contended that by this observation, their Lordships held that the lien created by the Regulation was a salvage lien and that therefore all the consequence attaching to a salvage lien attached to it.

We are unable to accept this view. Their Lordships throughout the judgment made it clear that the lien was created by the

Regulation, and they did not consider whether, apart from the Regulation, any salvage lien would be created by such a deposit. Indeed, by inference it seems that their Lordships held that there was no question of any lien created other than by the statute, because if a salvage lien had been created other than by the statute, the reservation in section 195 Bengal Tenancy Act would scarcely be applicable.

Therefore their Lordships held that the depositor's right was created by the statute, and it was merely the right defined in the statute. But they described that right as 'a statutory salvage lien'. We are unable to read this as meaning a right having all the incidents of salvage liens and known to Maritime Law or to the Irish Courts. In our opinion the words were used merely as descriptive of the right, and were not intended to indicate the legal consequence of the right or to suggest that rights in excess of those specifically mentioned in the Regulation acquired by the depositor.

It seems worthy of note that this Court held specifically that a darpatnidar making a deposit acquired a lien but not a first charge, and this finding was not specifically overruled by the Privy Council.

We are unable therefore to hold that the decision in *Ramjiban Bhadra v. Tasuddin Kasi* (1) must no longer be regarded as good law in view of the decision in *Arthur Henry Forbes v. Bahadur Singh and others* (2).

It is now necessary to consider whether, independently of section 13 of Regulation VIII, a darpatnidar by making a payment of the head rent due to the zemindar, thereby preventing the patni being sold for arrears and thereby protecting the interests of all incumbrancers acquired a 'salvage lien' taking priority over all other liens. In this connection our attention was drawn to an observation of the Judicial Committee in *Nugent v. Nugent* (3). One of the questions which arose in that case was whether a mortgagee making deposit under section 9 of Act I of 1845, of arrears of Government revenue and thereby preventing the estate from being sold for arrears acquired a lien on the estate. The section merely provided that the depositor 'shall be entitled to recover the amount of the deposit with

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(1) (1911) 15 C. W. N. 404.

(2) (1914) L. R. 41 I. A. 91; I. L. R. 41 Calc. 926; 25 C. L. J. 434.

(3) (1867) 11 Moo. I. A. 241.

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interest from the proprietor of the said estate'. The High Court held that under the section only a pursuable right against the proprietor was given and that no equitable lien on the estate was created. The Privy Council observed (page 258). "Considering that the payment of the revenue by the mortgagee will prevent the talook from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion, than that the person who had such an interest in the talook as entitled him to pay the revenue due to Government and did actually pay it was thereby entitled to a charge on the talook as against all persons interested therein for the amount of money so paid." At first sight this seems to be a clear recognition that independently of the statute, a salvage lien was created by the deposit in such circumstances. The meaning of this observation was considered by a Full Bench of this Court in *Kinnu Ram Das v. Monoffor Hosain Shaha* (1) and it was held by a majority of the Judges, that in spite of this observation, no salvage lien was created by such deposit.

In our opinion the interpretation placed by the Full Bench on the dictum of the Privy Council, is binding on us unless it has since been overruled. The matter came again before the Privy Council in *Monohar Das Mohanta v. Hasarimull* (2) which was a case involving the deposit by a mortgagee under section 9 of Act XI of 1859 whereby the estate was saved from sale for arrears of Government Revenue. Their Lordships referred to the case of *Nugenderchunder Ghose v. Sreenutty Kaminee Doss* (3) and quoted with approval the passage cited above, but again they did not hold that a 'salvage lien' was created independent of the statute.

In our opinion the repetition of the above passage in this later ruling cannot be interpreted as overruling the interpretation put upon the passage by the Full Bench.

We are therefore of opinion that no 'salvage lien' independent of statute was created by the darpatnidar making a deposit.

It follows therefore that the darpatnidar merely obtained a lien which would be postponed to all the prior mortgages.

Mr. Gupta drew our attention to the amendment to section 13 of Regulation VIII of 1819 effected by section 7 of Bengal Act XV of 1940. By this amendment two clauses were added to the section

(1) (1887) 1 L. R. 14 Cal. 809.

(2) (1931) L. R. 58 I. A. 341; 54 C. L. J. 125.

(3) (1867) 11 Moo. I. A. 241.

providing that a 'salvage lien' of the nature of that provided by section 171 Bengal Tenancy Act be created in favour of any person whose interests are affected by the sale of a patni taluk or a share or a portion thereof, who makes a deposit and thereby prevents the sale. It was pointed out that the right conferred on a darpatnidar under the old law was maintained intact, and it was argued that this was an indication that the legislature regarded the original section as giving to the darpatnidars rights at least as extensive as those conferred by the amendment on other persons whose interests are affected. We are unable to accept this view. It follows from what has been stated above that defendant No. 8 did not obtain a lien having priority over any of the mortgagees in the present case, either by virtue of his original deposit or by virtue of his subsequent payments of the head rent.

The question then arises whether the darpatnidar (defendant No. 8) was entitled to add the amounts of his subsequent payments to the original charge under the provisions of section 72 of the Transfer of Property Act. In this connection our attention was drawn to section 59A of the Act and it was contended that before this could be done, notice of the intended payments must be given not only to the mortgagor but also to the puisne mortgagees. In our opinion, it is not reasonable to give section 59A such a wide meaning and we consider that the section refers only to such persons as heirs, executors and assigns, who derive title as mortgagor or mortgagee.

In our opinion the learned Subordinate Judge was right in holding that the letters Exhibits L and M series show that sufficient notice was given to enable the darpatnidars to add the amount of these payments to the original charge. It was agreed by all parties before us that it is desirable that the dues of the puisne mortgagees and of the darpatnidar (defendant No. 8) be determined in this suit and that a decree be drawn up in Form No. 9. If this is to be done, the method of accounting must be determined, and the question arises whether the darpatnidar being a mortgagee in possession was entitled to apply the net income of any year to purchasing subordinate tenures or to liquidation of subsequent advances before applying it to the satisfaction of his claim in respect of the original deposit. Reference was made to the case of *Behari Lal Biswas v. Nasimannessa Bibi* (1), in which Beachcroft, J. clearly expressed the opinion that a darpatnidar, making

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a deposit under Regulation VIII is not entitled to add to his demand the rent paid to the superior landlord for the years during which he was in possession. This was at best an *obiter dictum*, and purported to be based on an earlier decision of this Court. But that earlier decision does not support this view. We are of opinion that the darpatnidar is entitled under section 72 Transfer of Property Act to add the subsequent payments to his original deposit.

In considering how the mortgagee in possession is to apply the net income of the property, it must be borne in mind that the holder of a simple mortgage is entitled merely to have the corpus kept intact and preserved from waste etc., and he has no interest in the manner in which the income from the property is spent. We can see no reason why the mortgagee in possession should not spend the income in any way agreed upon between him and the mortgagor, provided that the security of prior mortgagees is not thereby imperilled. It is clear that if the darpatnidar spent the income in purchasing subordinate tenure in auction sale, the security of the prior mortgagees, far from being imperilled was improved. In our opinion the darpatnidar was entitled at the request of the mortgagor to devote the income of any year to the purchase of subordinate tenures, thus enhancing the value of the security. We are therefore, of opinion that Mr. Gupta was right in urging that his clients were entitled to devote the receipts of any particular year to payments in the following order viz.,

- (a) payment of expenses of collection,
- (b) payment of patni rent to zemindar,
- (c) purchase of subordinate tenures if requested to do so by the patnidar
- (d) liquidation of his own claims against the patnidar for advances made subsequent to his original deposit.
- and (e) payments towards the original deposit.

The result is that the appeal allowed in part only. The finding of the learned Subordinate Judge that the deposit of the defendant No. 8 and his subsequent payments of rent do not have priority over the prior mortgages is upheld, but the suit is remanded to the lower Court for determination of the dues of the puisne mortgagees and of defendant No. 8 in order that a decree in Form No. 9 Appendix D first schedule of the Civil Procedure Code be drawn up. The parties will be allowed to adduce additional evidence on this point if they so desire. The cross-objections other than that dealt with above were not pressed.

As the main contentions of the appellant have been overruled and as the appellant failed in the Court below to provide materials from which the amount due to him could be determined, we direct that the appellant do pay the costs of the appeal to the contesting mortgagee respondents. There will be one set of costs to be divided among the contesting respondents.

G. N. Das, J. :—I agree.

S. C.

Appeal allowed in part.

*Decree of the lower Court modified and
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*Appeal from Original Order No. 212 of 1944, against the order of Sri S. K. Niyogi, Subordinate Judge, 2nd Court, Zillah Howrah, dated the 22nd May, 1944.

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The provisions of the United Provinces Encumbered Estates Act (XXV U. P. of 1934) with the previous sanction of the Governor General could only have effect over the United Provinces of Agra and Oudh and would *prima facie* be ultra vires if and so far as it affects the rights of the creditors which had originated outside that province.

If however that right is sought to be enforced by a suit in a Court in that province or a decree obtained outside is sought to be executed within the province, the legislature there would have the power to curtail the right to sue or to execute as is done in section 7 of the Act.

The whole scheme of the Act may be summed up to consist of three distinct stages. The first or the initial stage begins when the Collector of the District to whom application is presented examines whether the requirements as set forth in sections 4 and 5 have been complied with and ends with his passing an order for forwarding the application to the Special Judge appointed under section 3 of the Act. In the second stage the Special Judge ascertains the assets and liabilities of the applying landlord after adjudication in such a manner as to make it binding on the creditors. To give finality to his decision, it is treated as a Civil Court decree, subject to appeal and revision, executable under the provisions of the Act. The second stage ends with the Special Judge transmitting his decree to the Collector along with the list of landlord's properties liable to be attached and sold. The third and final stage is one of realisation and distribution of assets.

The inferences are :—

(a) that this scheme of administration fits in with the Act having only local operation in the strict sense of the term; that is to say, operation within the United Provinces and not beyond;

(b) that a creditor in whose favour the Special Judge has passed a decree cannot himself take out execution of the decree so passed in his favour; and

(c) that the intention of the legislature is to save the applicant landlord from harassment by and consequent expenses of suits and executions taken by his creditors, and, as section 7 indicates, within the province.

If only the language of section 18 is simply followed and no other considerations are brought to bear, a decree passed by a competent Court even outside the province in respect of a debt due by the landlord who made the application under section 4 of the said Act would be extinguished, for previously existing rights of the creditor are extinguished, and the right he has under a decree passed before the decree passed by the Special Judge would fall within the phrase "previously existing right" occurring in that section; but from the intention of the legislature as gathered from the statute and in view of the fact that the Special Judge cannot have jurisdiction over the claims of all and everyone of the creditors to whom notices under section 9 had been issued, it follows that it would involve in some cases assumption by him of jurisdiction of an extra provincial nature which the United Provinces Legislature could not in law confer on him.

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It follows therefore that the Special Judge had no jurisdiction to adjudicate upon the claim of the creditor and so section 18 of the Act and those provisions cannot affect the decree passed by this Court in favour of the creditor, for this Court had power under the Letters Patent to pass that decree and either to execute it itself or have it executed by a transferee Court and the provincial legislature even of this province, much less of another province, could have by legislation affected its jurisdiction at the time when the said decree was passed, for at that time the central legislature was by virtue of clause 44 of the Letters Patent the only legislative authority in India which could have modified the Letters Patent.

Narsing Das v. Chagmull (1) followed.

Shanber Vishnu v. Manshlal Haridas (2) and *Durrar Fatials v. Naraindas Gulab Singh* (3) approved.

The doctrine of submission to jurisdiction is an accepted doctrine in Private International Law but that doctrine is not applicable to domestic Courts, as consent cannot confer jurisdiction to a domestic Court where by law it has none.

Appeal by the Judgment-Creditor (Decree-holder).

Application for execution of a decree passed in the original jurisdiction of this Hon'ble Court.

The material facts will appear from the judgment.

Messrs. Ramaprosad Mukherjee and *B. N. Agarwalla* for the Appellant.

Mr. Sudhindra Kumar Mitter for the Respondents.

The judgment of the Court was as follows :—

Mitter, J.:—The two respondents, Ram Kissen Das and Lachmidas, along with two other persons, Narottam Das and Purushottam Das carried on a business in co-partnership in Calcutta under the name and style of Narottam Das Gujrati. In the course of business transactions the said firm incurred a liability to the appellant, Madangopal Bagla, for a certain sum of money. The liability so incurred was for the price of goods supplied in Calcutta. In 1930 Madangopal Bagla brought a suit, being No. 481 of 1930 in the Original Side of this Court against the said firm to recover the money so due to him and got a decree on the 22nd August, 1930 for Rs. 5696-15-3 with interest at 6 per cent. and costs. This decree would hereafter be referred to as

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(1) I. L. R. (1939) 2 Cal. 93, 135.

(2) (1940) I. L. R. [1940] Bom. 799.

(3) (1943) I. L. R. 25 Lah. 79.

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"the decree passed by this Court". On the 4th December, 1930 it was transmitted for execution to the District Judge of Benares. There the decree-holder, Madangopal Bagla, applied for execution. A sum of Rs. 1108-2-0 was realised by him in 1931 by the sale of some immovable properties situated in Benares. The District Judge, Benares, thereafter sent back the decree to the Court which had passed the decree, namely to the Original Side of this Court. The decree-holder thereafter had it transferred for execution to Howrah. On the 16th November, 1943 he filed his application for execution for the balance of the decree in the usual tabular form in the Second Court of the Subordinate Judge, Howrah. His prayer was for attachment and sale of a parcel of immoveable property situate within the District of Howrah, belonging to two of the partners of the firm of Narottam Das Gujrati, namely Ram Kissendas and Lachmidas. The application was registered in that Court on the 1st December, 1943 as Money Execution Case No. 2 of 1943, and a notice under order 21, rule 22 of the Civil Procedure Code was served upon the judgment-debtors. On the 12th April, 1944 Lachmidas appeared and filed an objection under section 47 of the Code. This objection was numbered Miscellaneous Case No. 12 of 1944. He contended (a) that the decree passed by this Court was no longer in existence as the Special Judge of Benares had already passed a decree in respect of the debt due to Madangopal Bagla under the decree passed by this Court under the provisions of the United Provinces Encumbered Estates Act (XXV of 1934 U. P. hereafter called the Act) and (b) that Madangopal Bagla having applied for execution of the decree passed by the Special Judge was precluded from executing the decree which he had obtained from this Court. The learned Subordinate Judge upheld the objections and by his order dated the 22nd May, 1944 has dismissed the execution case. The decree-holder, Madangopal Bagla, has filed this appeal. He made the firm Narottam Das Gujrati, and the two partners Ramkissendas and Lachmidas parties respondents to the appeal.

The following facts are either admitted by the parties or established by documentary evidence.

1. That Ramkissendas and Lachmidas are residents of Benares city, a town in the United Provinces of Agra and Oudh, that they have immoveable properties in the District of Benares and are the proprietors of a Mehal situate in that portion of the United Provinces in which the Encumbered Estates Act (XXV of 1934 U. P.) is in force ;

2. That they are "landlords" within the meaning of that Act ;

3. That on the 29th March, 1936 they applied to the Collector of Benares under section 4 of the said Act for reliefs under the Act, that their application was admitted by the Collector who by an order passed under section 6 of the Act transmitted the said application to the First Special Judge, Benares appointed under the Act ;

4. That in the written statement filed by the applicants, Ramkissendas and Lachmidas, before the Special Judge under section 8 of the Act they included the judgment debt due to Madangopal Bagla under the decree passed by this Court ;

5. That in pursuance of a notice issued by the Special Judge under section 9 of the Act and served on him, Madangopal Bagla appeared before the Special Judge and filed a written statement. This written statement is Exhibit 2 ;

6. That the Special Judge separated the liability in respect of Madangopal Bagla's said judgment debt between the applying judgment-debtors Ramkissendas and Lachmidas, on the one hand and the non-applying judgment-debtors, Narottamdas and Purushottamdas on the other, in the professed exercise of the powers given to him by sub-section 5 of section 9 of the Act. He held that the applying judgment-debtors were liable to pay to Madangopal Bagla Rs. 1390-8-9 plus interest up to the date of his order amounting to Rs. 214-4-8 and Rs. 214-12-0 as costs and the non-applying judgment-debtors Rs. 3539-7-9 plus Rs. 390-15-0 as interest up to the date of his order. He further directed payment of future interest at 6 per cent. per annum ; and

7. He passed a decree in favour of Madangopal Bagla and against the applying judgment-debtors, Ramkissendas and Lachmidas for the said sum of Rs. 1390-8-9 plus interest and cost as mentioned in sub-paragraph 6 above. This decree was passed by him on the 13th May, 1941 under the provisions of sub-section (7) of section 14 of the Act.

No appeal or revision was taken against this decree under the provisions of Chapter VI of the Act. The contention of the respondents before us, which has been accepted by the learned Subordinate Judge, is that this decree of the Special Judge has by reason of the provisions of section 18 of the Act, superseded the decree passed by this Court. That section runs as follows :—

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"Subject to the right of appeal or revision conferred in Chapter VI, the effect of a decree of a Special Judge under sub-section (7) of section 14 shall be to extinguish the previously existing rights, if any, of the claimant, together with all rights, if any, of mortgage or lien by which the same are secured, and where any decree is given by the Special Judge to substitute for those rights a right to recover the amount of the decree in the manner and to the extent hereinafter prescribed". As claims in respect of private debts, both decreed and undecreed, of the "landlord" who had applied for relief under section 4 of the Act are required to be investigated into by the Special Judge (sections 9 and 15 of Act) the effect of the decree passed by the Special Judge would be to extinguish the decree passed by this Court in favour of Madangopal Bagla, if the Special Judge had the power to pass an order under sub-section (5) of section 9 and the further power to pass a decree under sub-section (7) of section 14 of the Act in respect of the debt due to Madangopal Bagla, seeing that the debt had been incurred by the applicant landlords outside the United Provinces of Agra and Oudh and had been decreed, firstly, by a Court of competent jurisdiction situate outside that Province, and secondly, by the Original Side of this Court.

Act XXV of 1934 was passed by the United Provinces legislature with the previous sanction of the Governor General obtained in pursuance of the provisions of sub-section (3) of section 80A of the Government of India Act, 1915, 1919. But as that legislature had power to legislate for the peace and good government of that Province only the Act, notwithstanding the fact that previous sanction of the Governor General had been obtained could only have effect over that Province and not over any other Province of British India. *Prima facie* any provision made in that statute would be *ultra vires* if and so far as it affects the rights of creditors which had originated outside that Province which had been enforced by suits or sought to be realised by execution outside that Province. It would therefore follow that a decree passed by a Court outside that Province could not be affected in any way so long as it was not sought to be executed within that Province. If, however, that right is sought to be enforced by a suit in a Court situated within that Province or a decree obtained outside is sought to be executed within the Province the legislature of that Province would have the power to curtail or take away the right to sue or to execute as the case may be. In fact section 7 of the Act deals with such matters and enacts that suits or executions pending in

civil or revenue Courts, *in the United Provinces* in respect of any public or private debt owed by the landlord who has made the application under section 4 of the Act are to be stayed and no suit or proceeding against such a landlord is to be entertained in a Court within the Province after the Collector had by his order made under section 6 of the Act forwarded the application to the Special Judge till certain contingencies had happened. The relevant provisions of the Act must therefore be considered in the light of what we have said above and at the same time keeping in view the rule that that construction has to be preferred which would make the provisions of an Act *inter vires* the legislature which had passed it.

The preamble to the Act states that the object was to provide for relief to Encumbered Estates *in the United Provinces* and section 1(2) extends its operation to the whole of that Province with the exception of two Districts and portions of two other Districts. The word "Mehal" and the word "landlord" have been defined in section 2 of the Act in a manner which indicates that the legislature had in mind only estates situate in and persons residing within that Province. Section 4 gives the "landlord" as defined in section 2 of the Act who is subject to or whose estate is encumbered with private debts the right to make an application to the Collector of the District in which his lands or any portion thereof are situate requesting that the provisions of the act may be applied to him. This section and the sections of the Act which follow may be put into three distinct groups dealing with the three distinct stages of the proceeding.

The first or the initial stage is before the Collector of the District to whom the application is presented. The Collector is to see if the application had been filed within the time allowed and if it has complied with the other requirements mentioned in sections 4 and 5. If those requirements had been fulfilled he is to forward the application to the Special Judge appointed by the Local Government under section 3 of the Act on the basis of an order to be passed by him to that effect. Here the first stage ends and the second stage begins and it terminates in the Court of the Special Judge. Roughly speaking in this stage of the proceedings the assets of the applying landlord and his liability for his private debts, both decreed and undecreed, are ascertained after adjudication in such a manner as to make the adjudication binding on his creditors who had appeared before the Special Judge in

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pursuance of either a special notice served on them by the Special Judge or in pursuance of a general notice published by him in the manner prescribed by the Act. If a creditor chooses not to appear, the debt due to him will be taken to have been discharged. In view on the importance of the proceedings of this stage and their effect on the rights of creditors and the claimants to the applicant's property the legislature provided for a judicial adjudication by a Judicial Officer, namely a Special Judge, and gave a right of appeal and revision from the decision of the Special Judge to higher Courts, namely to the Court of the District Judge and to the High Court or the Chief Court, as the case may be, in the like manner as appeals and revisions are allowed against the judgment and decrees of Civil Courts. To give finality to the decisions of the Special Judge in respect of the claims of the creditors the adjudications of the Special Judge are to have the same effect as decrees of Civil Courts, subject to the limitation that decrees passed by the Special Judge against the applying landlord cannot be executed within the United Provinces except under the provisions of the Act. He is also to determine the public debts of the landlord, if there is a dispute in respect thereto, in those cases only in which a suit would have been maintainable either in a civil or revenue Court. In other cases the decision of the Collector is to be final. After the amount of the private and public debts of the applying landlord are thus ascertained by decrees of the Special Judge he is to rank the debts in order of priority keeping in view the provisions of section 16 of the Act. The second stage is very important. We have summarised generally the provisions falling within the second stage but for the purpose of deciding the question before us, namely, whether the Special Judge can thus adjudicate on debt, both decreed and undecreed, outside the Province, we will have to examine some of the sections falling within what we have called the second group in more detail. The second stage ends with the termination of the proceedings before the Special Judge with the transmission by him to the Collector of the decrees passed by him under sub-section 7 of section 14 of the Act together with a list of properties of the applicant landlord which he had found to be liable to be attached and sold. The third stage which is the stage of realisation and distribution of the assets then begins. The sections dealing with that subject run into great details. They also show what the Collector is to do in different contingencies for the purpose of having the private debts of the applicant landlord as determined by the Special Judge as also his public debts as

determined by him or by the Special Judge, as the case may be, paid. The points to be noted are :—

(1) that no property of the applicant landlord vests in the Collector as in the receiver in insolvency. Only in certain contingencies the Collector can sell or mortgage in usufructuary form, some but not all the properties of the applicant landlord. A residential house with necessary furniture must be left to him, and a certain portion of income producing property must also be left outside the mortgage. In certain contingencies the Collector is to transfer portions of his property to his creditors in satisfaction of their dues as determined by the Special Judge ;

(2) that the Collector cannot by his own act and without the help of a competent Court realise the assets of the applicant landlord situate outside the Province ;

(3) that the proceedings before the Collector are not like insolvency proceedings ; and

(4) that decrees passed by the Special Judge in favour of the creditors cannot be executed by them, but the Collector is to realise moneys from the applicant landlord or from his properties and pay the creditors. In short the creditors are to look to the Collector for payment and are to be paid by him or the local Government.

Thus conclusions follow from the following provisions laid down in the Act. The applicant landlord is at first given a chance to pay up his creditors whose dues had been determined by the Special Judge by paying to the Collector within two months after the Collector had received the papers from the Special Judge (section 22). If he pays, the Collector is to distribute the money among the creditors in the order of priority determined by the Special Judge. If no such payment is made by the applicant landlord the Collector is to sell in the first instance the applicant's properties included in the list sent by the Special Judge and which the latter had reported to be liable to attachment and sale, other than proprietary rights in land, subject to an exception that a residential house with necessary furniture is to be left to the applicant landlord. This power of sale given to the Collector extends only to properties within the Province. For realising money from properties outside the Province the Collector can only take recourse to execution proceedings in proper and competent Courts situate outside the Province on the assumption as if he was the

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decree-holder in respect of the decrees which the Special Judge had passed for the creditors (section 24).

If the sale proceeds of the sale conducted by him in respect of the applicant landlord's properties within the Province falling within the aforesaid description or the proceeds of the sale of applicant landlord's properties situate outside the Province realised through executing Courts outside the Province on the Collector's application are sufficient to discharge the decrees passed by the Special Judge the proceedings end there, the administration by the Collector being thus fully completed. If not the Collector is to mortgage in usufructuary form only a portion of the applicant landlord's property to a person willing to pay the balance of the debts due from him due on the basis of the Special Judge's decrees. Properties producing at least one-fourth of the post-slum profits must be left out of the mortgage apparently for affording the applicant landlord the means to meet his expenses (section 25). If no person is agreeable to accept an usufructuary mortgage on those terms then Collector is to determine the instalment value of the applicant's proprietary right in land liable to attachment and sale in accordance with certain rules framed by the local Government. If the amount still due by the applicant landlord is less than the instalment value so determined by the Collector the Collector is to direct the applicant to pay to the local Government money in such instalments covering a period not exceeding 20 years, as the local Government may determine, the obvious intention being that the local Government would pay the creditors (section 27). What has to be done by the Collector if the amount still due by the applicant landlord exceeds the instalment value is provided for in sections 28 and 31. Whatever instalments are ordered are to be paid by the applicant land into the treasury of the Local Government with the landlord revenue and cesses and can be recovered by the local Government by the same process by which arrears of land revenue can be recovered. On failure to pay two consecutive instalments the whole is to become due and can be recovered by the same process as land revenue (section 29). In order that the administration may be effective the applicant landlord is prevented from making any alienations till the contingencies mentioned in section 44 occur. These are (a) if his application is dismissed or (b) the proceedings quashed or (c) when his debts have been liquidated. We have dealt with this part of the Act in some detail for the purpose of drawing the following inferences :

(a) that this scheme of administration fits in with the Act having only local operation in the strict sense of the term, that is to say operation within the United Provinces and not beyond ;

(b) that a creditor in whose favour the Special Judge has passed a decree cannot himself take out execution of the decree so passed in his favour ;

(c) that the intention of legislature is to save the applicant landlord from harassment by, and consequent, expenses of, suits and executions taken by his creditors, and, as section 7 indicates, within the Province.

What we have stated in (b) above removes the misapprehension on which the learned Subordinate Judge has proceeded in coming to the conclusion that Madangopal Bagla, the appellant before us, had applied to execute in Benares the decree of the Special Judge passed in his favour. It is on this finding that he held that he, the appellant is to be taken to have accepted the decree passed by the Special Judge in his favour in substitution of the decree passed by this Court and so cannot be allowed to execute the last mentioned decree. The material on which he came to this finding to the effect that appellant was executing the decree of the Special Judge in Benares is the order recorded by the Sub-Divisional Magistrate, Benares, who was apparently exercising the powers of the Collector of that District under the Act, on the petition filed before him on the 27th March, 1944 by the applicant landlords, Ramkissen Das and Lachmi Das, and which has been set out at page 45C of Part I of the paper book. By that petition the said persons applied for the issue of an injunction by the said Sub-Divisional Magistrate, Benares, on the appellant Madangopal Bagla to restrain him from proceeding with this execution case (No. 2 of 1943) pending in the Second Court of the Subordinate Judge, Howrah. The learned Sub-Divisional Officer sent this petition to the Howrah Court with the following order passed on the 6th April, 1944.

"The Counsel for Madangopal Bagla creditor has not turned up. Let a copy of this petition be forwarded to the Court of the Second Subordinate Judge at Howrah with the remark that execution proceedings *regarding the decrees* in question (namely) decrees passed by the Special Judge are already going on under the *United Provinces Encumbered Estates Act* proceedings in this Court". This petition and this order which was in Urdu was filed by the judgment-debtor respondent before the learned Subordinate Judge on the 12th May, 1944 without a translation.

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On that day they prayed that a translation may be ordered to be made by an officer of the Court. The officer to whom the learned Subordinate Judge sent it for being translated reported on the 18th May, 1944 that with his limited knowledge of Urdu writings he could not read the document correctly as it was written in Sikastha style. The case was taken up for hearing on the 20th May following. The document was translated in Court on that date by a witness called for the purpose. Not knowing previously what was stated in the aforesaid order of the Sub-Divisional Magistrate, Benares the appellant filed a petition on the same day stating that he undertook not to proceed with the execution case pending at Benares. The arguments concluded on that date. The appellant asked for being allowed a little time to argue the point made by the judgment-debtors on the said order of the Sub-Divisional Magistrate, Benares, but his prayer was disallowed. In our opinion the appellant was placed under a disadvantage. The appellants lawyers assumed from the order of the Sub-Divisional Magistrate that *his client* had made an application for execution of the decree passed in his favour by the Special Judge. That was a wrong assumption and that mistake was excusable seeing that the learned Subordinate Judge in his considered judgment had made the same mistake. That order did not state that the *appellant had applied for execution* of the decree passed in his favour by the Special Judge and that *his application for execution* was pending in the Court of the Sub-Divisional Magistrate. It simply stated the fact that the decree passed by the Special Judge was under execution in proceedings taken before him under the Encumbered Estates Act. Having regard to the provision of the Encumbered Estates Act falling within what we have called the third group and which we have summarised above, that sentence in the Sub-Divisional Magistrate's order underlined by us means that he himself exercising the functions of the Collector of Benares District had started execution of the decrees passed by the Special Judge, and the execution so started was still pending. The underlined sentence means that he, the Sub-Divisional Magistrate, had already taken steps to realise the amounts decreed against the applicant landlords, but that he had not at that time actually realised the same. The aforesaid reason which is the first reason given by the learned Subordinate Judge in support of his order cannot be supported.

It is, therefore, necessary to examine the other contention of the judgment-debtors respondents which also found favour with

the learned Subordinate Judge, namely, whether the decree passed by this Court was superseded as soon as the Special Judge passed a decree in favour of the appellant in respect of the debt for which the decree was passed in his favour by this Court. This question involves the construction of section 18 of the Act. If only the language of this section is simply followed and no other considerations are brought to bear, a decree passed by a competent Court even outside the Province in respect of a debt due by the landlord who made the application under section 4 of the said Act would be extinguished, for previously existing rights of the creditor are extinguished; and the right he has under a decree passed before the decree passed by the Special Judge would fall within the phrase "previously existing right" occurring in that section. The learned Subordinate Judge simply proceeded upon the bare language of that section. He has not referred to any other provisions of the act for finding out the intention of legislature, nor has he considered the question whether that section would be effective on decree passed by competent Courts outside the United Provinces or on decrees passed by Chartered High Courts seeing that the Act is not a Central Act. In a matter of construction it is of the utmost importance to examine the statute as a whole and to find out the intention of the legislature. From the intention of the legislature as gathered from the Statute it may require the dictionary meaning of words and phrases in the section to be construed, to be restricted or expanded, as the case may be.

The preamble to the Act expresses the object of the legislation. It is to provide for the relief of encumbered estates in the United Provinces. The preamble by itself, does not help us on the question we have to decide. Section 1(2) makes the Act applicable to the whole of the United Provinces except certain specified areas. This is in accordance with the powers of the Provincial legislature as given by section 80A of the Government of India Act (1915-1919). Leaving aside the exception this means that the provisions of the Act would have operations, that is to say, effect in that Province only. Section 8 of the Act requires the applicant landlord to file a statement before the Special Judge specifying *inter alia* his debts, and giving the names and addresses of his creditors. It may be and probably is the intention of the legislature that the applicant landlord must give a complete list irrespective of the fact whether the debts or some of them had been incurred in or outside the Province or irrespective of the fact

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that the creditors reside within the Province or outside, or whether they have obtained decrees in Courts situate within or outside the Province. Section 9 empowers the Special Judge to publish general notices in the local gazette and in newspapers and also at the offices of the Collector within whose district any part of the applicant's property is situate calling upon the creditors of the applicant landlord to prefer their claims before him within a certain time. He is to send by registered post like notices to the individual creditors whose names and addresses appear in the statement of the applicant landlord filed under section 8. The intention of the legislature is that all creditors of the applicant landlord should have notice of the proceedings but it does not necessarily follow therefrom that the Special Judge would have jurisdiction to adjudicate upto claims of *all* the creditors of the applicant landlord, or that the effect of their non-appearance before him within time would be the discharge of their claims for ever, irrespective of any later fact. In our opinion sections 7, 13, 14(7) and 18 would have to be considered together, section 18 as its language implies would have operations only over the right of such creditors in respect of whose claims the Special Judge had passed decrees under section 14(7) of the Act. The bare fact that he had passed a decree is not sufficient. An enquiry must be made whether the decree he had passed was one which he had jurisdiction to pass, for a decree passed without jurisdiction is in the eye of law a piece of waste paper. The question for consideration therefore is over what claims the Special Judge had jurisdiction to adjudicate. It cannot in our opinion be held that he has jurisdiction over the claims of all and every one of the creditors to whom notices under section 9 had been issued, for that would involve in some cases assumption by him of jurisdiction of an extra provincial nature which the United Provinces Legislature could not in law confer on him. The presumption that a subordinate legislature legislates *intra vires* would stand against it, and so an intention which would have that far-reaching effect is not to be imputed to that legislature. Section 7 gives some indications of the intention of that legislature. It prevents suits and proceedings by creditors being instituted or taken only in Courts, civil and revenue in the United Provinces after the Special Judge had acquired seisin till the termination of the proceedings under the Act; suits and proceedings pending in such Courts only are stayed, and all processes in execution issued by such Courts only impending proceedings are rendered void. In our opinion the

intention of the legislature is to stay pending suits and proceedings or to stop their institution after the relevant date mentioned in section 7, so that the Special Judge may adjudicate upon the subject-matter of the proceeding suits or proceedings so stayed or may adjudicate upon the subject-matter of suits or proceedings which could have been, but for the bar imposed by section 7, instituted in the Province. No doubt the scheme is to confer on the Special Judge exclusive jurisdiction and for that purpose the jurisdiction of the ordinary Court are excluded. As the jurisdiction of Courts, civil and revenue, in the United Provinces only is excluded by section 7, and could be excluded by the legislature of that Province the exclusive jurisdiction intended to be conferred on the Special Judge by the process of exclusion would extend only over such debts for enforcement of which the creditors would have had to take recourse to Courts, situated in the United Provinces only and could not have had the right to take recourse to any Court outside that Province. This in our opinion is not only a reasonable construction but the only construction possible, for that legislature could not in law take away or curtail the jurisdiction of Courts situate outside the Province. No doubt section 10 on its language would apply to all creditors, and the section 13 defines the consequences of their non-appearance before the Special Judge within the prescribed time. But if the discharge of a debt be disputed it would be the subject-matter of a suit or proceeding in a civil or revenue Court, as the case may be. A Court would necessarily come into the picture and the legislature of the United Provinces cannot compel a Court outside the Province to accept the law as laid down by it in section 13 of the Act, a provision which can have operation in view of section 80A (1) of the Government of India Act (1915-1919) only within that Province and not beyond it, and United Provinces Legislature had in effect said so in section 1 sub-section 2 of the Act. The "creditors" in section 10 must be limited to those creditors only, who would have had to enforce their rights by suits or proceedings in the United Provinces only, and who could not have instituted their suits or taken proceedings in Courts outside that Province, either by reason of the provisions of section 16(c) and (d) or section 20 of the Civil Procedure Code or of the Letters Patents of Chartered High Courts, with or without leave, as the case may be. We accordingly hold that the Special Judge had no jurisdiction to adjudicate upon the claim of Madangopal Bagla and so section 18 of the Act and those provisions cannot affect the decree passed by this Court in

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favour of Madangopal Bagla, for the Court had power under the Letters Patent to pass that decree, and either to execute it itself or have it executed by a transferee Court and the Provincial Legislature even of this Province, much less of another Province, could not have by legislation affected its jurisdiction at the time when the said decree was passed, for at that time the Central Legislature was by virtue of clause 44 of the Letters Patent the only legislative authority in India which could have modified the Letters Patent, *Narsingh Das v. Chagemull* (1). Our decision is in agreement with the result of the decisions of the Bombay High Court in *Shankar Vishnu v. Maneklal Haridas* (2) and of the Lahore High Court in *Durrar Patials v. Narain Das Gulab Singh* (3). The last mentioned case is on all fours with the case before us. Although we agree with the result of those decisions we have some hesitation in holding that the United Provinces, a Province in British India, is to be regarded as foreign territory for the purposes of the said Encumbered Estate Acts, and so reserve our opinion on the reason given in the first mentioned case. We also reserve our opinion on some of the detailed reasons given in the last mentioned case.

The last contention of the respondents before us is that Madangopal Bagla is bound by the decree passed by the Special Judge, with the consequence that section 18 of the Act must have its operation on his pre-existing rights on the ground that he had submitted to the jurisdiction of the Special Judge. No doubt the doctrine of submission to jurisdiction is an accepted doctrine in Private International Law but in our judgment there is no scope for the application of that doctrine to domestic Courts. A domestic Court has either jurisdiction or none over the subject-matter of the litigation by the laws of the state. This is conveniently expressed by the maxim that consent cannot confer jurisdiction to a domestic Court, where by law it has none. To defeat this execution it will have to be proved that Madangopal had voluntarily abandoned his rights under the decree passed by this Court, and evidence on the record is not sufficient for so holding.

The result is that this appeal is allowed. The Execution Case started in the Second Court of the Subordinate Judge would

(1) (1939) I. L. R. (1939) 2 Calo. 93, 145 et seq. (S. B.)

(2) (1940) I. L. R. (1940) Bom. 799.

(3) (1943) I. L. R. 25 Lah. 79.

proceed from the stage in which it was before the 22nd May, 1944 when Miscellaneous Case No. 12 of 1944 was allowed. The appellant must have costs of this appeal and of the lower Court. The hearing fee in this Court is assessed at Rs. 85.

Sharpe, J. :—I agree.

S. C.

Appeal allowed.

Execution Case to proceed.

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*Before Mr. Justice B. K. Mukherjee and Mr. Justice
W. Mc. C. Sharpe.*

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Civil.

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May, 28.

*Bengal Tenancy Act (VIII of 1855), sections 65 and 146A, Chapter XIV—
Defaulting tenure sold during the pendency of an execution proceeding—
Tenure, if passes at the rent execution sale unless the purchaser is made a
party to the execution proceedings.*

Held, where a tenure is sold pending the execution of a decree for arrears of rent in respect of the same tenure, the purchaser must be made a party to the execution proceeding in order that the rent sale may have the effect of a sale under Chapter XIV of the Bengal Tenancy Act.

The decision of the Special Bench of this Court in *Frishna Pada Chatterjee v. Manada Sundari Ghosh* (1) which was based on the pronouncement of the Judicial Committee of the Privy Council in *Forbes v. Bahadur Sing* (2) is that the right to bring a tenure or holding to sale under section 65 of the Bengal Tenancy Act exists so long as the relationship of landlord and tenant subsists between the parties and consequently if the relationship does not exist at the date of the sale, it would not have the effect of rent sale under Chapter XIV of the Bengal Tenancy Act.

*Appeal from Appellate Decree No. 1543 of 1941 against the order of the District Judge of Zillah Backergunge, dated 23rd July, 1941 reversing the decree of the Munsiff, 3rd Court, Patuakhali, dated 28th February, 1941.

(1) (1932) 36 C. W. N. 518.

(2) (1913) L. R. 41 I. A. 91; 18 C. W. N. 747.

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Binsapani Dabi v. Banku Behari Mandal (1) followed.

Section 146 A(2) provides that even if some of the co-sharer tenants are left out in a rent suit but still if the defendants to the suit represented the entire body of the co-sharer tenants, the decree would have the effect of a rent decree and the sale would have the same consequences as the sale of a holding or tenure under Chapter XIV of the Bengal Tenancy Act.

But, for any reason other than the non-joinder of all the tenants as parties defendants to the suit, the suit cannot have the effect of a rent decree or the sale a rent sale and section 146A has no application at all.

Appeal by the Defendants.

Suit for recovery of rents.

The material facts will appear from the judgment.

Messrs. Jitendra Nath Guha and Satya Priya Ghose for the Appellants.

Mr. Radhika Ranjan Guha for the Respondents.

The following judgments were delivered :

May, 28.

Mukherjee, J. :—This appeal is on behalf the defendants in a rent suit. To appreciate the controversy between the parties, it would be necessary to state a few facts. The lands in suit in respect of which rent has been claimed by the plaintiffs appertain to a nim howla which is recorded in Khatian No. 74 and belonged originally to one Muhammad Selim Khalifa. After Muhammad Selim's death, it devolved upon Abdul Hanif Khalifa and others. The rent of the nim howla having fallen into arrears, the superior landlord instituted a rent suit against the tenure-holders and obtained a rent decree on the 31st January, 1936. The decree was put into execution on the 28th March, 1936, and a sale was held on the 11th August, 1936, the purchaser being one Habibur Rahaman. After the execution case was started and before the sale took place, the tenure was put up to sale in execution of a mortgage decree obtained by a mortgagee decree-holder against the tenants, and it was purchased by the present plaintiffs, on the 2nd May, 1936. The mortgage sale was confirmed on the 22nd July, 1936. The plaintiffs have on the basis of their purchase at the mortgage sale, brought this suit for recovery of rents against the tenants who are in possession of the disputed lands under the owners of the nim howla. The defence was that the plaintiffs did not obtain any title by virtue of their purchase at the mortgage

sale inasmuch as the sale in execution of the rent decree passed the tenure itself to the auction-purchaser, Habibur Rahaman who got it free and clear of anybody-else's interest.

The trial Court gave effect to this contention of the defendants and dismissed the plaintiffs' suit. On appeal the judgment was reversed and the learned District Judge of Backergunge who heard the appeal decreed the plaintiffs' suit, being of opinion that the plaintiffs not being made parties to the proceedings in execution of the rent decree, the sale had not the effect of a rent sale under Chapter XIV of the Bengal Tenancy Act. It is the propriety of the decision that has been challenged before us by Mr. Jitendra Nath Guha who appears in support of the present second appeal to this Court.

It seems to us, on hearing the learned Advocates on both sides, that the view taken by the Court of appeal below is right. The decision of a Special Bench of this Court, in *Krishna Pada Chatterjee v. Manada Sundari Ghosh* (1) which was based on the pronouncement of the Judicial Committee of the Privy Council in *Forbes v. Maharaj Bahadur Singh* (2) is that the right to bring a tenure or holding to sale under section 65 of the Bengal Tenancy Act exists so long as the relationship of landlord and tenant subsists between the parties, and consequently if the relationship does not exist at the date of the sale, it would not have the effect of rent sale under Chapter XIV of the Bengal Tenancy Act. This was a case where the landlord ceased to be the landlord after obtaining his decree, but before putting the tenure to sale, but the same principle has been applied to cases where the tenant's interest ceases before the date of the sale, and it has been held that in such cases also the interest of the transferee who was not made a party to the execution proceeding did not pass by the sale which had not the effect of a sale under Chapter XIV of the Bengal Tenancy Act *vide Binapani Debi v. Banku Behari Mondal* (3). In our opinion, the principle enunciated in this case applies to the facts of the present one, and consequently it must be held that the plaintiffs' title remained unaffected by the sale in execution of the rent decree. Mr. Jitendra Nath Guha has challenged the propriety of the decision in *Binapani Debi v. Banku Behari Mondal* (3) referred to above on the ground that the learned Judges in deciding this case did not advert to or consider the effect

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(1) (1932) 36 C. W. N. 518.

(2) (1914) L. R. 41 I. A. 91; 18 C. W. N. 747.

(3) (1943) 47 C. W. N. 651.

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of sub-section (a) of section 146A of the Bengal Tenancy Act. In our opinion, that contention really is of no substance. Section 146A contemplates a case where there are more than one tenant on the land, and sub-section (a) provides that even if some of the co-sharer tenants are left out in a rent suit, but still if the defendants to the suit represented the entire body of the co-sharer tenants, the decree would have the effect of a rent decree and the sale would have the same consequences as the sale of a holding or tenure under Chapter XIV of the Bengal Tenancy Act. The decree would not cease to be a rent decree by reason of the fact that all the tenants were not impleaded as parties defendants to the rent suit, nor, on the other hand, the sale would cease to have the effect of a rent sale by reason of all the tenants not being proceeded against as judgment-debtors in the execution proceeding. But if for any other reason other than the non-joinder of all the tenants as parties defendants to suit, the decree cannot have the effect of a rent decree, or the sale in execution of the decree cannot operate as a sale of the holding or tenure as contemplated by Chapter XIV of the Bengal Tenancy Act, section 146A of the Bengal Tenancy Act has got absolutely no bearing on the question. This has got to be decided on the other provisions of law laid down in the Bengal Tenancy Act. If under section 65 of the Bengal Tenancy Act, it is necessary that the relationship of landlord and tenant must continue down to the date of the sale in order that the holding or tenure may pass to the transferee, that position in our opinion is not in any way affected by section 146A. In our opinion, therefore, the decision of Blank and Biswas, JJ., in *Binapani v. Banku Behari* (1) is perfectly sound, and the ground put forward by Mr. Jitendra Nath Guha would fail.

Mr. Jitendra Nath Guha has further argued that in the present case it was not possible for the landlords to make the plaintiffs parties to the execution proceeding inasmuch as they were not aware of the purchase at the mortgage sale. It appears that there is oral evidence on the record which is practically one-sided and which goes to show that the landlords had knowledge.

Quite apart from that, as the sale was in execution of a mortgage decree, notices would be served upon the landlords under the provisions of section 13 of the Bengal Tenancy Act. The presumption in law would be that such notices were served. It was certainly open to the landlords to rebut that presumption by

(1) (1943) 47 C. W. N. 651.

showing that no notice was served upon them or even if it was served at all, it was served after the rent sale took place, but no such evidence was adduced by the defendants to this suit, and consequently we are unable to say that the landlords had no knowledge of the plaintiffs' purchase. The result, therefore, is that we dismiss this appeal, but make no order as to costs in this Court.

Sharpe, J. :—I agree.

S. C.

Appeal dismissed.

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Mukherjee, J.

FULL BENCH.

*Before Mr. Justice C. C. Biswas, Mr. Justice A. L. Blank
and Mr. Justice P. Chakravarti.*

SM. SARAJUBALA GUHA THAKURTA AND ANOTHER

v.

ASWINI KUMAR GHOSH AND OTHERS.*

Civil.

1946.

May, 1, 2.

June, 4.

Appeal—Appeal from final decree passed on review—Order granting an application for review, questioned—Grounds—Civil Procedure Code (Act V of 1908), sections 95, 100, 104, order 43, rule 1.

When an order granting an application for review is questioned in an appeal from the decree ultimately passed, the appellant is limited to the grounds specified in order 47 rule 7 of the Code of Civil Procedure, and is not entitled to show that none of the grounds for review, as specified in rule 1, exists.

Nritya Gopal Mitra v. Jarit Manjari Dasi (1) over-ruled.

Bishenwar Pratap Sahi v. Purath Nath (2) distinguished.

*Full Bench Reference No. 1 of 1942 in Appeal from Appellate Decree No. 51 of 1939, against the decree of D. N. Guha, Esq., Subordinate Judge, 1st Court of Bakerganj, dated the 30th July, 1938, reversing the decree of M. A. Wahab, Esq., Munsiff, 5th Court of Barisal, dated the 12th June, 1936.

(1) (1924) 30 C. W. N. 584.

(2) (1934) L. R. 61 I. A. 78 ; 60 C. L. J. 267.

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Sections 96 and 104 and order 43 rule 1 of the Code of Civil Procedure have not the effect of enlarging the grounds, where the grounds are limited and specified.

An order granting an application for review, made by the first appellate Court, cannot, by reason of the provisions of section 100 of the Code of Civil Procedure, be challenged in second appeal from the final decision on grounds other than those mentioned in order 47, rule 7 of the Code. Section 100 of the Code should be read as subject to the provisions contained in order 47 rule 7.

Appeal by the Plaintiffs.

Suit for declaration of plaintiffs' title and confirmation of possession through defendants Nos. 2 to 7, rent for a certain period and, in the alternative, damages.

The appeal first came up for hearing before Akram and Pal, JJ., who made a reference to a Full Bench by the following Order of Reference:—

This is an appeal by the plaintiffs in a suit for declaration of title and confirmation of possession of a *howla* or in the alternative for recovery of possession of the same through the tenants-defendants Nos. 2-7. The plaintiffs' case is that their mother Sarala-Sundari purchased the disputed *howla* along with *kayam karkha* tenancy and a *brahmattar* from Kailash Das and his two brothers by a *Kobala*, Exhibit 2, dated the 20th Sraban, 1319 B.S.—4th August, 1912. The plaintiffs claim by right of inheritance from their mother. The claim is contested by the defendant No. 1 whose case is that he purchased the *howla* on the 14th February, 1920, at a sale held in execution of a money decree obtained by the landlords against the alleged vendors of Sarala Sundari, that the *kobala* on which the plaintiffs based their claim was merely a sham transaction, Sarala Sundari being merely a benamdar of her vendors.

The Court of first instance found against the defence contention and decreed the suit on the 12th June, 1936. The defendant No. 1 thereupon preferred an appeal and this appeal was dismissed by the Subordinate Judge. The defendant No. 1 therefore applied for a review of this judgment and decree of the Court of appeal below on the ground that there was an error apparent on the face of the record, inasmuch as a previous judgment in a rent suit (Exhibit J) was simply referred to in the appellate judgment without looking into the real findings arrived at therein. The application for review was made before the learned Subordinate Judge who disposed of the appeal. He issued notices on this

application but the matter was finally disposed of by his successor-in-office, who, by his order, dated 26th March, 1938, granted the review. The ground on which he granted the review will appear from the following observation made by him in course of his judgment:—

"In rent suit which the Dasses contested and in which they pleaded having sold away to Sarala this plea was negatived, it being held that it was a *benami* conveyance for no consideration. The ground of the review is that Sarala's daughter's claim under the same conveyance which was found to be *benami* in the rent suit and as such the judgment in the rent suit ought to have been regarded as an important piece of evidence and thoroughly examined but was as it were passed over. It appears that the judgment in the rent suit did find that the conveyance was *benami* which was not fully considered in the appellate judgment and so there is a legitimate grievance and the appeal should deserve to be re-opened and heard again especially with reference to that judgment."

Another ground of discovery of new documents was also urged in support of the review but this did not find favour with the learned Subordinate Judge. He granted the review solely on the ground stated above. Thereafter, the learned Subordinate Judge who granted the review heard the appeal, allowed the same, set aside the judgment and decree of the lower Court and dismissed the suit with costs. The plaintiffs thereupon preferred the present appeal and their main contention is that the review was granted without sufficient ground.

Order 47, rule 7, of the Code of Civil Procedure lays down that an order granting an application may be objected to on the ground that the application was (a) in contravention of the provisions of rule 2, (b) in contravention of the provisions of rule 4, or (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause. It is further provided by the rule that such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

The appellants did not prefer any appeal from the order granting the application for review but have taken the objection in their appeal from the final decree made in the suit.

It is not the case of the appellants that the provisions of rule 2 were in any way contravened in this case, nor is it their case that the application was made after the expiration of the period of

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limitation prescribed therefor. Their case is that the application was in contravention of the provisions of rule 4.

Rule 4 lays down (i) where it appears to the Court that there is no sufficient ground for a review it shall reject the application ; (ii) where the Court is of opinion that the application for review should be granted it shall grant this ; provided that (a) no such application shall be granted without previous notice to the opposite party to enable him to appear and to be heard in support of the decree or order, a review of which is applied for ; and (b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation. The contention of the appellant is that the order granting the review was in contravention of the provisions of this rule, inasmuch as there was no sufficient ground for a review.

For this purpose the appellant referred to rule 1 of the same order which lays down only three grounds for review, namely, (1) the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order made ; (2) or some mistake or error apparent on the face of the record ; and (3) any other sufficient reason.

The review in this particular case seems to have been granted on the ground that there was an error apparent on the face of the record, the error complained of being an omission on the part of the Judge who originally disposed of the appeal to look into certain findings in the judgment, Exhibit J. The appellants contend that these findings would be no evidence at all, inasmuch as they were not parties to the suit in which this judgment was given.

It is not disputed that the review was granted on an untenable ground ; but that the question is whether the order granting the review can be objected to on this ground upon appeal.

The learned Advocate, appearing for the respondents, contends that the only ground of objection available to the appellants would be that the application for review was in contravention of the provisions of rule 4. Rule 4 was not contravened simply because there was no sufficient ground for review under rule 1 ; clause (a) of rule 4 leaves it to the discretion of the Court to say whether the application should be granted, and if the Court is of

opinion that the application for review should be granted it will be entitled to grant it and its order granting the review shall not be liable to be objected to either by way of appeal or by objection in the appeal from the final decree unless it could be shown that the proviso to clause (2) were in any way violated. In support of his contentions he relied on the cases reported in *Munni Ram Chowdhury v. Bishen Perhash Narain Singh* (1); *Sheikh Sadaruddin v. Ekramuddin* (2); *Hari Charan Saha v. Baran Khan* (3); *Lan Tin Ngan v. Ma Mya Kyin* (4) and *Saherjan Bibi v. Gopal Chandra Putaturida* (5). On the strength of these cases the respondents contended that an order granting the review cannot be assailed on the ground that there was no ground for granting it. It can only be attacked on the limited grounds specified in rule 7 of order 47. Rule 4 of the order is not shown to have been contravened simply by showing that the ground on which the review was granted was not covered by rule 1. Rule 4 is contravened only if the application is disposed of contrary to the provisions contained in the proviso to clause (2) of the rule.

The appellants, on the other hand, relied on the cases of *Nritya Gopal Mitra v. Jarit Manjuri Dasi* (6); *Kumar Sarat Kumar Roy v. Sripati Chatterjee* (7); *Srimati Garabini Kamarin v. Suraj Narain Singh* (8) and *Narayana Chettiar v. P. C. Muthu Chettiar* (9). On the strength of these authorities, the appellants contended that if the review was granted on a ground which was no ground for review under rule 1 of order 47, then the order granting the review would be liable to be set aside. Rule 4 will be contravened if a review is granted where, as a matter of fact, there is no sufficient ground for review.

In *Munni Ram Chowdhury v. Bishen Perhash* (1), (Trevelyan and Stevens, JJ.), it was held that no appeal lay from an order granting a review of judgment except in cases specified in section 629 of the Civil Procedure Code. That the Court which

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(1) (1897) I. L. R. 24 Calc. 878.

(2) (1913) 20 I. C. 670.

(3) (1914) I. L. R. 41 Calc. 746.

(4) (1929) I. L. R. 7 Rang. 187.

(5) (1929) 34 C. W. N. 265.

(6) (1925) 30 C. W. N. 584.

(7) (1919) 23 C. W. N. 242.

(8) (1924) I. L. R. 3 Pat. 134.

(9) (1927) I. L. R. 50 Mad. 67.

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had granted the review had done so without sufficient reasons was not a valid ground of appeal under section 629.

Similar view was taken in *Shrikk Sadaruddin v. Ekramuddin* (1), by Jenkins, C. J. and Mookherjee, J., in a suit for arrears of rent where the question in controversy was whether the relationship of landlord and tenant existed between the parties. The Court of first instance awarded this question in favour of the defendant and dismissed the suit. Upon appeal the Subordinate Judge reversed this decision and decreed the suit. An application for review of judgment was then presented to the Subordinate Judge and notice was directed to be issued thereupon. The application was finally disposed of by his successor. The latter officer granted the application and directed the appeal to be re-heard. The appeal was then re-heard and the decision of the Court of first instance was affirmed. The plaintiff then appealed to the High Court and contended before Chatterjea, J., that it was beyond the authority of the Subordinate Judge to set aside on review the judgment of his predecessor because the only ground that was urged in support of the review was such as would only justify the modification of the judgment and not its reversal in its entirety. This contention found favour with Chatterjea, J., and he passed a decree in favour of the plaintiff. This decision of Chatterjea, J., was questioned in the Letters Patent Appeal and it seems to have been contended *inter alia* that in an appeal against the final decree the propriety of the order granting the review could be challenged only on the ground specified in section 629, Civil Procedure Code, 1882. This contention was upheld by the learned Judges who heard the Letters Patent Appeal and the following observation was made by them in the course of their judgment—"In the case before us it cannot be reasonably contended that the ground on which the propriety of the order of the Subordinate Judge is challenged falls within any of the grounds specified in section 629. Consequently, the appeal is infructuous".

It may be noticed here that these two cases were under the Civil Procedure Code of 1882 which provided for the appeal only by its section 629 corresponding to the present order 47, rule 7, Civil Procedure Code, and did not contain any general provision for appeal corresponding to the one contained in the present order 43, rule 1(w).

(1) (1913) 20 I. C. 670.

In *Haricharan Saha v. Baran Khan* (1), however, Carnduff and Richardson, JJ., held that order 43, rule 1(w), must be read with and subject to rule 7, order 47.

Similar view was expressed in the cases of *Nandalal Mullick v. Panchanan Mukherjee* (2); *Surja Narain v. Kunja Behari* (3) and *Latia Ngan v. My Mya Kyin* (4).

In *Saherjan Bibi v. Gopal Chandra Putaturida* (5), B. B. Ghose and N. K. Basu, JJ., held that in an appeal from an order granting a review on the ground of discovery of fresh evidence it is not competent for the appellate Court to consider whether the new evidence is important or not (order 47, rule 1). That must be left to discretion of the Court, deciding the application for review.

It appears to us that the decision in the case of *Nritya Gopal Mitra v. Jarit Manjuri Dassi* (6), militates against the view in the case of *Munnirum Chowdhury v. Bishen Parkash* (7) and some of the other cases referred to above. The other decision cited by the appellants may be reconciled with the decision cited by the respondents.

In the case of *Kumar Sarat Kumar Roy v. Sripati Chatterjee* (8), it appears that the review was sought on the ground of discovery of new matter or evidence which the applicant alleged was not within his knowledge or could not be adduced by him when the decree was made. The matter therefore was covered by proviso (b) to sub-clause (2) of rule 4 of order 47, but it was said that if what was alleged to have been discovered was not admissible in evidence at all, or there was no discovery of "new evidence" within the meaning of that proviso, then the accepting of that new matter as evidence contravened the proviso. Similarly the decision in the case of *Srimati Garubini Kamrin v. Suraj Narain Singh* (9) also proceeded on the footing that the ground of review being discovery of new matter or evidence, the order granting the review was passed in contravention of this proviso,

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(1) (1914) I. L. R. 41 Calo 746.

(2) (1917) I. L. R. 45 Calo 60; 21 C. W. N. 1075.

(3) (1921) 25 C. W. N. 884.

(4) (1929) I. L. R. 7 Rang. 187.

(5) (1929) 34 C. W. N. 265.

(6) (1925) 30 C. W. N. 584.

(7) (1897) I. L. R. 24 Calo. 878.

(8) (1919) 23 C. W. N. 242.

(9) (1924) I. L. R. 3 Pat. 134.

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inasmuch as it was not strictly proved that the omission in question (namely the omission to refer to a Full Bench decision of the High Court), was due to the want of knowledge of the applicant as to the existence of that decision. The Madras case also proceeded on similar grounds.

The case in *Nritya Gopal Mitra v. Jarit Manjuri Dasi* (1), however, cannot, in our opinion, be explained away in the above manner. Here the suit was for ejectment on the ground of abandonment by transfer of a non-transferable occupancy holding. The defence *inter alia* was that all the lands of the holding had not been sold. The Court of first instance decreed the suit. On appeal the learned Additional District Judge, Mr. Ross, allowed the appeal and dismissed the suit, finding that the evidence to show that the whole holding was transferred was insufficient and not satisfactory enough to prove the respondents' case. There was an application for review of the decision of Mr. Ross on the ground that the area of the holding as found by him was the result of a clerical error. Mr. Ross himself granted this application for review and thereafter went on leave. His successor-in-office heard this appeal and found that there was a clerical error in the area in the certified copy of the Kobala by which the appellant purchased. He was, therefore satisfied that the whole of the holding had been transferred and on this finding dismissed the appeal.

Against this judgment and decree, Second Appeal No. 1417 of 1922, was preferred in this High Court and it was held in that appeal that the ground on which the review was granted was not a ground within the purview of order 47, rule 1, of the Code of Civil Procedure, and consequently, the order granting the review was liable to be set aside. On this ground the appeal here was allowed, the judgment and decree of the District Judge after review were set aside, the order granting the review was also set aside, and the original judgment and decree of the District Judge before the review were restored. It was contended in the said appeal that the order granting the review was not liable to be objected to in this Court on the ground that the review was not in accordance with the provisions of order 47, rule 1, and that the appeal was limited to the ground set out in order 47, rule 7. The learned Judges who heard this appeal disposed of this objection with the following observation: "We do not think that the

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objection raised by the learned vakil for the respondents is sound. Order 47, rule 7, expressly provides that when an application for review is granted the party dissatisfied with the order may appeal against that order or may take the same objection in an appeal filed against the final decree. Under rule 7, read with rules 1 and 4, it appears that it is open to the appellate Court to examine the ground upon which the review was admitted and if the ground for the review does not come within the words of rule 1, then the appellate Court is competent to hold that the review was improperly admitted but should have been rejected under rule 4(1). This is clear from the case of *Chhajju Ram v. Naki* (1) and this was the ground which was pointed out by their Lordships for their interference in that case when they say that 'there could be no rehearing for the purpose of seeing whether the different conclusion on the merits should be adopted.'

It is apparent that the learned Judges in coming to their conclusion relied on *Chhajju Ram's* case (1), as implying that the non-existence of a ground of review as specified in rule 1 of order 47 is a good ground on which an order granting a review can be assailed on appeal or in other words, the grounds of objection to the order granting a review will not be confined only to the infirmities attached to the application for review as specified in rule 7 but will also extend to seeing whether the ground on which the review is sought is one available under order 47, rule 1, Civil Procedure Code.

The point of law upon which we are making this reference relates to the following question *vis.* :—

Whether, when an application for review is granted by a Court, and an objection is taken to the order granting the review in the appeal from the final decree passed in the suit, non-existence of the grounds of review as specified in rule 1 of that order is available as a ground of such objection.

As the question is one of general importance we think it desirable that the divergence in the judicial opinion may be set at rest once for all so that a settled procedure may be followed. As the matter arises in an appeal from an appellate decree we refer the whole appeal for the final decision of the Full Bench.

Mr. Jitendra Nath Guha for the Appellants.

Mr. Prafulla Kumar Roy for the Respondents.

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The following judgments were delivered :

Chakravartti, J. :—Before the first Civil Procedure Code was enacted, inferior courts in India had no power to review their judgments, except with the sanction of superior courts. The Code of 1859 for the first time provided by section 376 that a person, aggrieved by a decree of a court of "original jurisdiction", might apply for a review of judgment on the ground of discovery of new matter of evidence or for any other good and sufficient cause, and by section 378 it was enacted that a review might be granted, if the court considered it necessary for correcting an evident error or omission, or otherwise requisite for the ends of justice. It was provided at the same time that the order of the court, whether granting the review or rejecting the application, "shall be final". In the year 1873, it was held by a Full Bench of this Court in the case of *Bhyrubi Chunder Surmah Chowdhry v. Madhub Ram Surmah* (1) that the finality of the order was not absolute and only meant that it could not be appealed from as an order, but objections to it could always be taken in an appeal from the final decree. Presumably, the position created by this ruling was considered unsatisfactory, for, if the order could not be appealed from immediately, but could yet be objected to in an appeal from the final decree, an unnecessary waste of time and money would occur in cases where, in such appeal, the order was held to have been wrongly made. The Code of 1877 met the situation in two ways. It continued to provide that an order, rejecting an application for review, shall be final, but as regards an order granting an application, it specified certain grounds of objection which could be taken either by an immediate appeal from the order or in an appeal from the decree passed on review. The provisions relating to review were also recast in several other ways. The Code of 1882 re-enacted the provisions of the Code of 1877 in exactly the same form, even the numbers of the relevant sections being the same. The provision relating to appeal was expressed in the following language :—

'629. An order of the court for rejecting the application shall be final ; but whenever such application is admitted, the admission may be objected to on the ground that it was

(a) in contravention of the provisions of section 624,

(b) in contravention of the provisions of section 626, or

(1) (1873) 20 W. R. 84 (F. B.)

(c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be made at once by an appeal against the order granting the application or may be taken in any appeal against the final decree or order made in the suit".

Apart from the provision contained in the last part of the section, the Code did not give any right of appeal from an order, granting an application for review.

The Code of 1908, by Order 47, rule 7, practically re-enacted the provisions of section 629 of the Code of 1882, but some alteration was made in the language. It reads thus :—

"7. (1) An order of the court rejecting the application shall not be appealable ; but an order granting an application may be objected to on the ground that the application was

(a) in contravention of the provisions of rule 2,

(b) in contravention of the provisions of rule 4, or

(c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit".

Rule 2 of order 47 corresponds to section 624 of the Code of 1882 and rule 4 corresponds to section 625 ; but it will be noticed that while the Code of 1882 provided that when an application for review was admitted, the *admission* might be objected to on the ground that it contravened section 624 or section 626 or had been made after expiry of the period of limitation, the Code of 1908 provides that an order granting the application may be objected to on the ground that the *application* contravened rule 2 or rule 4 of order 47 or was made after expiry of the period of limitation.

Another change introduced by the Code of 1908 was that apart from the provision contained in the last part of order 47, rule 7, a right of appeal from an order granting an application for review was given in a general and unqualified manner by section 104(1) (i), read with order 43, rule 1(w). Those provisions stand as follows :—

"104 (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force from no other orders :—

* * * *

(i) any order made under rules from which an appeal is expressly allowed by rules"

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Order XLIII.

"(1) An appeal shall lie from the following orders under the provisions of section 104, namely :—

(w) an order under rule 4 of Order XLVI granting an application for review."

Two other provisions in the Code of 1908 may in this connection be referred to :—first, section 96, which gives an unqualified right of appeal from every decree passed by a Court exercising original jurisdiction, except when expressly barred ; and secondly, section 100, which gives a right of appeal from a decree of a first appellate Court on the ground that the decision is contrary to law or vitiated by a substantial error or defect in the procedure.

The point for decision in the present case is whether, when an order granting an application for review is questioned in an appeal from the decree ultimately passed, the appellant is limited to the grounds specified in order 47, rule 7, or is entitled to show that none of the grounds for review, as specified in rule 1, existed. The question arises out of the following facts.

By a *kobala*, dated the 4th August, 1912, Sarala Sundari, mother of the plaintiffs, purchased from certain Dases three properties, the *howla* which is the subject-matter of the present suit, a *kayami karsha* tenancy and a Brahmothar. On the 14th February, 1920, defendant No. 1 purchased the *howla* in execution of a money decree obtained by him against the Dases. Thereafter he brought a suit for rent against defendants Nos. 2 to 7, who are tenants under the *howla*, and obtained an *ex-parte* decree on the 4th August, 1930. In order to remove the cloud thus cast on their title, the plaintiffs commenced the present suit on the 21st June, 1935, asking for a declaration of their title and confirmation of possession through defendants Nos. 2 to 7, rent for a certain period and, in the alternative, damages. The tenant defendants did not contest the suit, but defendant No. 1 set up the plea that the alleged purchase by the plaintiffs' mother was a *benami* transaction and she was a mere *benamdar* of her vendors. In support of this plea, reliance was placed upon a judgment in a previous suit (Exhibit J) which defendant No. 1, as the landlord of the *kayami karsha*, had brought against the Dases for rent of that tenancy and in which the defence of a transfer to Sarala Sundari by the same conveyance was said to have been repelled on the finding that the alleged transfer was a *benami* transaction.

The trial Court held that the sale to the plaintiffs' mother was a genuine sale and decreed the suit. An appeal by defendant

No. 1 was dismissed. But, thereafter, he made an application for review of the appellate judgment on the ground of discovery of fresh evidence as also on the extraordinary ground that in holding against his contention, the Court had not paid due regard to the findings in Exhibit J. Notices of this application were directed to be issued by the learned Judge who had heard the appeal, but it came up for disposal before his successor. That learned Judge was not prepared to grant a review on the ground that fresh evidence has been discovered, but he granted it on the ground that Exhibit J had not been "fully considered in the appellate judgment" and that, therefore, "the appeal should deserve to be re-opened and heard again". He heard it in due course, gave to Exhibit J the full consideration to which, according to him, it was entitled and dismissed the plaintiffs' suit on the finding that the *kobala* in favour of their mother was a *benami* document.

Against that decision, the present second appeal was preferred by the plaintiffs. It came up for hearing before Mr. Justice Akram and Mr. Justice Pal when it was contended on behalf of the appellant that the ground on which a review had been granted was not a proper ground of review under the Code and that, therefore, the original judgment should be restored. The contesting respondent did not dispute that the review had been granted on an untenable ground, but it was contended on his behalf that the order granting the review was not open to question on this ground in appeal.

As regards the grounds on which an order granting an application for review could be objected to in appeal, the learned Judges noticed a difference of opinion between decisions of this court. They referred to six cases where it had been definitely held that the grounds, open to an appellant, were limited to those specified in Order 47, rule 7 of the Code of 1908 or section 629 of the previous Code, as the case might be, and three more, where too, the ground upon which the Court had pronounced would, on close examination, be found to be one of the grounds specified in rule 7. But there was one decision of a Division Bench in the case of *Nritya Gopal Mitra v. Jarit Manjari Dasi* (1) which could not be explained away and there it had been expressly held that in an appeal from a decree passed on review, the appellate court was entitled to see if the ground on which the review had been granted was warranted by rule 1 of Order 47,

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(1) (1925) 30 C. W. N. 584.

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and if it found it was not, to hold that the review had been improperly granted. In view of this decision the learned Judges thought it necessary to refer to a Full Bench the following question of law :—

“Whether, when an application for review is granted and an objection is taken to the order granting the review in an appeal from the final decree passed in the suit, non-existence of the grounds of review as specified in rule 1 of that Order is available as a ground of such objections”.

Reference was also made by the learned Judges to certain decisions of other High Courts in which one or the other of the two views had been taken, but they expressed no opinion of their own.

It was contended before us on behalf of the appellants that although a direct appeal from an order granting an application for review might have to be limited to the grounds specified in rule 7 of Order 47, an appeal from the decree, ultimately passed, could not, in this respect, be held to be similarly limited, in view of the wide language of sections 96, 100 and 104 and Order 43 rule 1. It was contended further that assuming that objections available in an appeal from the final decree were also limited to the grounds specified in Rule 7, those grounds themselves covered contravention of rule 1. Rule 7 (1) (b) mentioned contravention of rule 4 as one of the proper grounds of review. Rule 4 (a) authorised the Court to grant “an application for review”, which meant a proper application, that is to say, an application based on one or more of the grounds mentioned in rule 1. If the Court granted an application which was not such an application, it contravened rule 4 (a) and, therefore, in order to establish a contravention of rule 4 (a), which was within the words of rule 7, contravention of rule 1 could properly be shown.

The contention of the appearing respondent was that the provisions relied on by the appellant could not be held to confer a right of appeal, unrestricted as to the grounds, unless it was also held that by them Order 47 rule 7 stood virtually repealed. It was contended further that both the language and the policy of the Code made it sufficiently clear that the Legislature did not intend that an order granting an application for review should be liable to objection on any ground other than those specified in rule 7, whether in a direct appeal from the order or in an appeal from the final decree.

In addition to the cases referred to in the Order of Reference, the learned Advocate for the appellants cited before us one other decision of this Court, *Chiranjilal Ramlal v. Tulsiram Jankidass* (1), two decisions of the Patna High Court, *Hasballav Prasad Chowdhury v. Jagballav Prasad Chowdhury* (2) and *Garbari Kumarni v. Surja Narain Singh* (3) and one decision of the Privy Council, *Bisheshwar Pratap Sahi v. Parath Nahi* (4).

As pointed out in the order of Reference, all the decisions of this Court, except one, are against the contention of the appellants. The one further decision cited by them before us is not of the slightest assistance to them, since there a review had been granted on the ground of discovery of fresh evidence and in an appeal from the order granting the review, it was set aside on the ground that there was no strict, or any, proof before the trial Judge that the applicant had previously been unaware of the existence of the new evidence or could not have produced it at the original trial. The only decision of this Court in favour of the Appellants is, therefore, that in the case of *Nritya Gopal Mitra v. Jarit Manjari Dasi* (5).

Whatever may be the correct answer to the question referred, it appears to us plain that the ground upon which that decision proceeds, is erroneous. The learned Judges hold that it is competent to an appellate court to examine the ground upon which a review was granted and if it finds that the ground was one outside rule 1 of Order 47, to declare that it should have been refused. For this proposition, reliance is placed entirely on the decision of the Privy Council in *Chhaju Ram v. Nahi* (6). "This", they say, "is clear from the case of *Chhaju Ram v. Nahi* (6) and this was the ground which was pointed out by their Lordships for their interference in that case". It is overlooked altogether that in *Chhaju Ram's* case (6), the Privy Council was not correcting an error committed by an Indian appellate court in the exercise of its appellate jurisdiction with regard to an order granting a review, made by the Subordinate Court whose decision was under appeal. What the Privy Council had before it was an order made by the Chief Court of the Punjab, granting a

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(1) (1919) I. L. R. 47 Cal. 568; 31 C. L. J. 134.

(2) (1939) I. L. R. 18 Pat. 777.

(3) (1923) 75 I. C. 177.

(4) (1934) L. R. 61 I. A. 78; 39 C. W. N. 1; 60 C. L. J. 267.

(5) (1924) 30 C. W. N. 584.

(6) (1922) L. R. 49 I. A. 144; 26 C. W. N. 607; 36 C. L. J. 459.]

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review of its own decision in an appeal and the decision ultimately passed by the Chief Court on review. It was with this order that the Privy Council interfered, sitting in appeal over the ultimate decision and that it could do on any ground, not being bound by the Civil Procedure Code. The decision is no authority on the power of an Indian appellate court under the Code itself.

In our opinion, the scope of objection to an order granting an application for review, cannot possibly be wider in an appeal from the final decree than in an appeal from the order itself. Were it so, the position would be that a person aggrieved by such an order might first prefer an appeal against it on one or more of the grounds specified in Order 47, rule 7 and if he failed in the appeal, a fresh decision would be given on a review of the previous judgment. But he might then return to the attack in an appeal from the final decision and urge other objections against the same order and if he succeeded this time, as he conceivably might, the original judgment would be restored and all the time and money spent on all the proceedings since then, except the second appeal, would be absolutely thrown away. A procedure which may confuse the course of litigation in this manner cannot be held to be contemplated by the Code, unless the language used by the Legislature compels such construction. The language of Order 47, rule 7 however, points in an opposite direction, for, after forbidding appeals from an order rejecting an application for review, it provides for an appeal against an order granting an application on certain specified grounds and goes on to say that such grounds can be taken either in an immediate appeal from the order or in an appeal from the final decree. The implication clearly is that whether in the one appeal or the other, the grounds available to the appellant are the same and the only grounds that can be taken are those mentioned in the rule. This accords with what, in our view, was the object of the changes made in the Code of 1877. After the Full Bench decision in *Bhynub Chunder's* case (1), the Legislature thought it right to provide, on the one hand, for an immediate appeal, so that the parties might not be subjected to the hardship of first suffering an order for review and next a fresh decision and then being told in an appeal from the fresh decision that the review had been wrongly granted, and on the other hand, to limit the grounds of objection admissible against the order, whenever it might be challenged. There could

(1) (1873) 20 W. R. 84 (F.B.)

be no sense in providing for different grounds of objection against the same order at different stages or for compartmental appeals, as it were, and, in our opinion, the Legislature has done no such thing. If the contention of the appellants be correct, it must be held, which, in our view, is not possible, that the Legislature has indirectly kept alive the very mischief which it intended to prevent by providing for an immediate appeal.

The argument founded on the language of sections 96 and 104 and of Order 43, rule 1 is, in our view, misconceived. Those provisions of the Code deal with the right of appeal and not the grounds; and the absence of anything in the body of the Code, that is to say, the sections portion, in limitation of the right of appeal, cannot have the effect of enlarging the grounds, where the grounds are limited and specified. It is true that as regards second appeals, section 100 mentions certain grounds in language of a very general character, but, in the first place, those grounds relate to the decision itself and not to any interlocutory orders which are dealt with in section 105 and, in the second place, the general provision contained in section 100 must be read as subject to the specific provision contained in Order 47, rule 7 in the sense that what is an error of law or defect of procedure in an order granting an application for review is defined there. The position is the same as in the case of section 114 and Order 47 rule 1, for, the section gives the right of review and the rule gives the grounds. We are, therefore, not of opinion that by reason of the provisions of section 100, an order granting an application for review, made by a First Appellate Court, can be challenged in a second appeal from the final decision on grounds other than those mentioned in order 47, rule 7.

There is one other circumstance which points to the conclusion at which we have arrived. Before the Code of 1908 was enacted, it had been held in a series of cases that even in an appeal from the final decree, the only grounds on which an order granting the review could be objected to, were those mentioned in section 629. The case of *Sheikh Sadaruddin v. Ekramuddin* (1) was a case of a second appeal, as is the present case. In spite of these decisions, the Legislature made no change in the Code of 1908 to indicate its intention that in the case of an appeal from the decree ultimately passed on review, grounds other than those mentioned in order 47, rule 7 would be available. There

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were in the Code of 1882 provisions corresponding to the present sections 96 and 100 expressed in the same language. The only change made by the Code of 1908 was to include an order, granting a review, among the appealable orders enumerated in order 43, thereby making express what had previously been implied in section 629, but no change was made as to the grounds of appeal.

The second contention of the appellants is, in our opinion, even less tenable. It was said that assuming that Order 47, rule 7 was exhaustive of the grounds that could be taken in any kind of appeal, contravention of rule 1 was included in contravention of rule 4 which was specifically mentioned in clause 1(b) of the rule. This result was said to follow from the occurrence of the phrase 'application for review' in rule 4(a) which contemplated an application in accordance with rule 1 and, therefore, so it was contended, contravention of rule 4 included the granting of an application based on grounds, foreign to the first rule.

The language of the opening clause of the present rule 7, like that of the opening clause of the old section 629, is ill-chosen and it is clearly impossible to apply it intelligibly to all the three grounds of objection mentioned. In rule 7, the grounds are stated by reference not to the order granting the application for review, but to the application itself, while in section 629 they were stated by reference to the "admission" of the application, which meant the order. Neither, however, can fit in with all the three grounds of objection which are the same in the old and the new provision. Ground (a) is contravention of rule 2 which corresponds to the old section 624 and has reference to the Judge to whom the application must be made. Ground (b) is contravention of rule 4 which corresponds to the old section 626 and requires previous notice to the opposite party as also strict proof of an allegation of discovery of new evidence, while giving a general discretion to the Judge to grant the application if he thinks it should be granted. Ground (c) is limitation. It will thus appear that while the 'application' may be affected by the bar of limitation and may also perhaps contravene rule 2, if not made to the proper Judge, it is not conceivable how it can contravene rule 4. The contention of the appellants that an application contravenes rule 4 when it is not in accordance with rule 1 is, in our opinion, clearly untenable, for rule 4 is not addressed to the nature and contents of the application at all: the phrase 'application for review' in the rule simply means an application,

and any application, by which a review is prayed for. As regards the old section 629, while the 'admission' of an application might contravene section 626 (rule 4), or perhaps even section 624 (rule 2) when the admission was not by the proper Judge, it is quite impossible to find any relevancy of ground (c) which referred to limitation, for there was no time-limit then, as there is none now, within which the order of the court must be made. The only reported case which notices the inappropriateness of the language of Order 47, rule 7, *Madura Brahmayya v. Vedula Vellamma* (1) says that the word 'admission' must have been changed into 'application' by mistake, but it overlooks the fact that even the word 'admission' could not fit in with the third ground of objection.

But whether the word 'application' is to be understood as meaning the order or whether the word 'granted' is to be read after the last word 'was' in the opening clause and whatever matters the grounds of objection may cover on either reading, they do not, in our opinion, cover absence of the grounds of review, as specified in rule 1. If the Legislature intended that contravention of rule 1 should also be one of the grounds of objections, there is no reason why it should not have included it in plain terms in the list of contraventions set forth in rule 7. The argument that it was left to be spelt out of the words 'application for review' in rule 4 proceeds on a canon of interpretation which is so unnatural as to be almost fantastic.

In our opinion, the Legislature, through the successive Code, seems to have left the matter of a review of judgment more and more to the discretion of the Judge. It has enjoined that a review should be granted only in cases where one or more of the grounds specified in the Code exist, but at the same time it has provided that if the Judge himself thinks that his decision should be reconsidered, the exercise of his discretion cannot itself be made the subject of an attack on the ground of the non-existence of sufficient reasons, but it is liable to question only on the ground that some transgression of jurisdiction or gross violation of procedure happened, as when the Judge, granting the application, was not the proper Judge to do so, or the application was granted, although it was barred by limitation or without notice to the opposite party. To quote from an old decision, "the Code does not seem to supervise with very jealous scrutiny the exercise of powers which, after all, tend to complete

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(1) (1916) 31 M. L. J. 509.

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enquiry and consideration of the case upon the merits". *Baroda Churn Ghose v. Gobind Proshad Tiwary* (1). It is noteworthy, as pointed out by the respondent, that the provision in the old Codes which required the Judge to record the reasons for his opinion with his own hand, has now been deleted.

It can hardly be said that if such be the intention of the Legislature, it has left the parties to the arbitrary will of the Judge without any remedy. The parties are only affected by the ultimate decision and since an appeal will always lie from that decision, any errors of fact or law can, in most cases, be corrected in that appeal, without going behind to see whether the review was rightly or wrongly granted. There is no impediment at all in the case of any error in a decision of a trial court: none again, as regards errors of law committed by a court of first appeal. They can all be corrected in the course of dealing with the final judgment in appeal. It is only when a court of first appeal has made a new finding of fact in the judgment passed on review that a party is really prejudiced, for such a finding cannot ordinarily be challenged in second appeal. But in most such cases, the new finding would be arrived at on a consideration of fresh evidence and the admission of such evidence would be a matter open to question, even in second appeal, so that the only real prejudice would be the possibility of a remand, in case the objection is established. The chance of any real prejudice to the parties, if the words of the Code are read in their natural sense, is exceedingly small and can be no ground for attributing to them an extended meaning, in view of the other considerations to which we have referred.

We have not thought it necessary to consider in detail the various decisions in which the one view or the other was taken. Most of them give no reasons and few of them were cited. But reference must be made to the decision of the Privy Council in the case of *Bisheshwar Pratap Sahi v. Parath Nath* (2).

In that case nothing was decided and there was no argument before their Lordships on the question which, in *Chhajju Ram's* case (3), had been distinguished by Viscount Haldane, viz. the question, with regard to an order granting a review, of the powers of the appellate court in an "appeal to a Court of appeal". The facts were that after the Subordinate Judge had disposed of the

(1) (1895) I. L. R. 22 Cal. 984.

(2) (1934) L. R. 61 I. A. 78; 39 C. W. N. 1; 60 C. L. J. 267.

(3) (1922) L. R. 49 I. A. 144; 36 C. L. J. 459.

suit and dismissed it, an application for review was made before him by the plaintiffs on the ground that a party who was a limited owner and whose life-interest the defendants had attached had died on the day the judgment had been delivered, or the day before, and the plaintiffs had thus become entitled to the property as reversioners. This application was granted and the Subordinate Judge, who had previously dismissed the suit, now decreed it, overlooking the fact that the suit was for a declaration of title, on the basis of a deed of relinquishment which he had found to be fictitious and fraudulent. In an appeal to the High Court by one of the defendants, the ground that the Subordinate Judge had acted erroneously in reviewing his judgment was taken, but did not appear to have been urged. The appeal was dismissed on the finding that the appellant could not execute a money decree, obtained against a limited owner, against properties which had come into the possession of the next reversioners. The Privy Council held that the review having been granted on a ground not covered by order 47, rule 1, had been wrongly granted and in that view restored the original judgment of the Subordinate Judge, but it disallowed costs to the successful appellant on the ground that the objection on which he succeeded had not been relied upon in the High Court. On this order of their Lordships, it was contended before us that the Privy Council had in effect held that in an appeal from the ultimate decision given on review, an objection to the review on the ground that it had been granted on a ground not warranted by rule 1 could be urged before, and entertained by, the appellate court.

We are unable to hold that the order of the Privy Council can be relied upon for a proposition of so wide and general a character. It is perfectly true that their Lordships held that the ground, on which the Subordinate Judge had granted a review, was one outside rule 1 of Order 47 and they restored the original judgment of the Judge on that ground. It is also true that they refused to award costs to the appellant in the view that the objection to the review, which succeeded before them, might and ought to have been urged before the High Court. But the last matter was not argued and seems to have been assumed. Neither the judgment, nor the report of the arguments, contains any indication that their Lordships' attention was drawn to rule 7. or that any question was raised or considered as to the scope of objections to an order granting a review which are open to

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an appellant under the provisions of the Code. In these circumstances, we do not find it possible to hold that their Lordships decided any question as to the scope of an appeal against an order for review under the Indian procedure or that they intended to overrule the very large body of Indian decisions to the opposite effect without giving any consideration to them. The actual order of their Lordships is explicable, as the respondent pointed out, by the circumstance that the ground for review taken before the Subordinate Judge was really one of a discovery of a new matter and since it is quite plain that nothing was alleged or proved, as to the applicant having previously been unaware of it, the matter really came under rule 4 (2) (b) and, if so, it might and ought to have been urged in the appeal before the High Court under the express provision in rule 7 (1) (b). In any case, we are unable to read in the observations of their Lordships, which were only made in connection with the order for costs, a decision on so important a matter to a consideration of which they were never invited. No inference, it need hardly be repeated, can be drawn from the act of the Privy Council itself in restoring the original judgment of the Subordinate Judge, in the view that none of the grounds of review, as specified in rule 1 existed, for the Privy Council is not bound by the Civil Procedure Code.

For the reasons given above, the answer to the question referred must, in our opinion, be in the negative.

It remains to deal with the appeal which also has been referred to a Full Bench under the rules of the Court. We are clearly of opinion that the use which the learned Subordinate Judge made of the previous judgment, Ex. J., is as extraordinary as the ground upon which he granted a review. The judgment is not *inter partes*, the plaintiffs were not parties to the suit in which it was given and although the vendors of the plaintiffs were, the suit having been brought after the sale to the plaintiff, they are not in any way bound by the judgment suffered by their vendors. In the circumstances, little more could be admissible of the judgment than its existence as a fact. The learned Judge, however, took statements and findings contained in it as facts and it is perfectly clear that he maintained the opinion upon which he had granted the review, viz. "the judgment in the rent suit ought to have been regarded as an important piece of evidence and thoroughly examined" and that the appeal should be "heard again especially with reference to that judgment". That

was what he in due course did and since his decision was mainly influenced by matters contained in the previous judgment, which could not legitimately be imported, it must be set aside and the appeal re-heard.

In the result, the question referred to a Full Bench is answered in the negative. The appeal is allowed. The judgment and the decree of the court of appeal below are set aside and the appeal remanded to the lower appellate court to be re-heard in accordance with law in the light of the observations contained in this judgment. The appellants will have from the appearing respondent their costs for the hearing before the Division Bench, but there will be no order for costs for the hearing before the Full Bench.

Biswas, J. :—I agree.

Blank, J. :—I agree.

A. T. M.

*Appeal allowed :
case remanded.*

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On transfer of the non-transferable occupancy holding by the original tenant long before occupancy rights became transferable in law, the landlord becomes entitled to re-enter the land at once. If the landlord does not take any steps to recover possession of the property and allows the transferee to remain in occupation of it for 12 years or more, the latter would acquire a limited interest of a tenant by adverse possession and the right of the landlord to recover khas possession of the land would be barred by limitation unless he can make out a case under section 18 of the Indian Limitation Act and prove that he was kept out of his knowledge of his right to institute the suit by reason of any fraud committed by the transferee.

The unrecognised transferee whose possession was *prima facie* adverse to

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the landlord from the date of his purchase would acquire the status of a tenant in full sense of the word, and although the landlord did not recognise him as a tenant he would have all the rights of a tenant by the operation of the statute of limitation in his favour and the landlord cannot proceed against the original tenant who is no more liable for rent.

The sale in execution of a decree obtained against the original tenant without making the transferee a party to the suit would not affect the rights which the latter has acquired by adverse possession. Where the transferee of a non-transferable occupancy holding has acquired the title of a tenant by adverse possession of the limited interest, the transferee and not the transferor is liable for rent. So a suit by landlord against the transferor of non-transferable occupancy holding after his acquisition of limited interest by the transferee for rent, does not bind the transferee. But before his acquisition of such limited interest, the transferor was liable. *Raja Gopal Lal Roy Bahadur v. Feshtun Muhammad Shah Choudhury*

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Article 144 and not Articles 134A to 134C, Schedule I of Limitation Act which were introduced by the Amending Act I of 1929, is applicable to the facts of the present case.

When an endowed property is alienated by a manager the possession of the allenee becomes adverse as soon as he is without any title to the property. If the transfer is void *ab initio*, the possession of the transferee is adverse from the very date of the transfer. If, on the other hand, it is not void but is only voidable at the instance of the succeeding manager, possession cannot be adverse until the office of the alienating mohunt ceases.

Under the following circumstances a transfer by a manager of endowed property is void *ab initio*: Firstly, when he acts in negation of the trust. If the alienation is not merely of certain items of the endowed property but of the endowment as a whole, the possession of the transferee is unlawful from the very beginning and limitation would run from the date of the transfer.

Secondly, even if the subject-matter of transfer is only particular item or items of endowed property the question whether the transaction is void or voidable would depend upon the fact whether the *shabait* or the manager purported to transfer the same in his capacity as manager or in his own individual capacity as secular owner of the property.

A *shabait* or manager has the right to alienate portions of endowed property for purposes of legal necessity. He may exceed his powers, but if the transfer of the dalty's property is by the *shabait* or the manager as such, the transferee would, at least, acquire an interest

Adverse possession—(Contd.):

which would be valid during the lifetime of the transferring mohunt, but if the manager transfers the property belonging to the dely as his own property asserting his own personal interest in the same his act itself is adverse to the trust. The transferee in such cases would acquire no title to the property and his possession would be unlawful from the beginning.

The same principle applies to involuntary transfers as well.

Whether the possession of the purchaser at a mortgage sale is or is not adverse to the endowment would depend upon the fact as to whether the mortgage was executed by the manager *qua* manager on behalf of the dely or in his own individual capacity as secular owner of the property in denial of the rights of the dely. In the first class of cases the mortgage is not void altogether and the purchaser at a mortgage sale would, at least, acquire an interest which will endure during the lifetime of the manager. If, on the other hand, the manager asserts his own individual ownership in the property in denial of the rights of the dely and purports to act not as shebait but as proprietor of the endowed property the mortgagee would not acquire any interest by such transaction. The purchaser at the mortgage sale would be a trespasser out and out and his possession would be adverse from the date of his purchase. *Sm. Hemanta Kumari Bose v. Sri Sri Iswar Srihar Jew*

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When an order granting an application for review is questioned in an appeal from the decree ultimately passed, the appellant is limited to the grounds specified in order 47 rule 7 of the Code of Civil Procedure, and is not entitled to show that none of the grounds for review, as specified in rule 1, exists.

Sections 96 and 104 and order 43 rule 1 of the Code of Civil Procedure have not the effect of enlarging the grounds, where the grounds are limited and specified.

An order granting an application for review, made by the first appellate Court, cannot, by reason of the provisions of section 100 of the Code of Civil Procedure, be challenged in second appeal from the final decision on grounds other than those mentioned in order 47, rule 7 of the Code. Section 100 of the Code should be read as subject to the provisions contained in order 47 rule 7. *Sm. Sarajubala Guha Thakurta v. Aswini Kumar Ghosh*

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A handnote was executed and the consideration paid in Mymensingh where the defendants live. The obligee subsequently assigned the handnote to his son in Calcutta. Later on the son obtained a decree upon the handnote in the Original Side of the High Court which he sought to execute in Mymensingh. The judgment-debtor objected to the execution of the decree on the ground that it was passed without jurisdiction. His wife also made a claim under order 21 rule 58 of the Code of Civil Procedure with regard to some items of property. During these proceedings the judgment-debtor died leaving his wife:	
<i>Held</i> , that the decision regarding the claim of the wife which was made at a time when she had by the death of her husband become the representative of the judgment-debtor, was a decision under section 47 of the Code of Civil Procedure. The appeal was, therefore, competent and not barred under the provision of order 21 rule 63 of the Code of Civil Procedure.	
Assignment of the decree in Calcutta constituted a part of the cause of action and there would be no want of jurisdiction, if leave to sue in the Original Side of the High Court was obtained.	
<i>Prima facie</i> the Court has jurisdiction unless absence of jurisdiction is apparent on the face of the record.	
Where leave has been granted under section 12 of the Letters Patent and where the propriety of the grant is challenged, the proper course is for the defendant to apply at the earliest opportunity for revocation of the grant. <i>Amiya Prova Das v. Jyoti Prokash Ghosh</i>	131
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Compensation—(Contd.):

under the Defence of India Act, the Court is to look primarily to the provisions of the Act itself and the Rules framed thereunder, and this can be supplemented by the provisions of general law with regard to matters on which the Act or the Rules are silent provided that they are not inconsistent with the latter.

If the person to be compensated prays for an arbitration on a specific ground, the Collector has not got to make a reference on that particular ground only. The entire question of compensation is referred to arbitration and the arbitrator is to hear the matter in accordance with the provisions of the Defence of India Act and follow, so far as practicable, the procedure laid down for suits of an original civil character in the Code of Civil Procedure. The jurisdiction of the arbitrator is not confined to a consideration of the only ground that has been taken by the claimant.

A reference to arbitration under section 19 of the Defence of India Act is not previously of the same character and has not the same legal implication as a reference to Court by the Collector under section 18 of the Land Acquisition Act.

It is open to the Central Government to raise an issue before the arbitrator relating to the measurement or area of the lands acquired even if the question was not raised at any earlier stage of the proceeding. The offer of Collector, which proceeded on the basis of certain measurement is not final on the law and it is open to the Central Government to ask the arbitrator to investigate the matter on other and further evidence.

There can be no question of sending the case back on remand by the arbitrator for further investigation by the Collector or for making a fresh offer to the claimant with the sanction of the Government. If a fresh offer is made which is not accepted by the claimant a fresh arbitration must necessarily follow and the basis of the present arbitration proceeding will disappear altogether.

The proper procedure for the arbitrator to follow will be to ask the parties to file their respective statements as contemplated in section 19(1) (d) of the Defence of India Act. **Ram Brich Singh v. The Province of Bengal**

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Complaint—Code of Criminal Procedure (Act V of 1898), section 4(h)—A person lodging information of theft—Found false by police—Notice to show cause why he should not be prosecuted under section 211 of the Indian Penal Code (Act XLV of 1860)—“Naraji” petition filed by him, if a complaint within section 4(h)—Magistrate finds that prima facie case for prosecution has been made out, issues summons and observes that “This also disposes of the ‘naraji’ petition”—If a proper order of dismissal of “naraji” petition under section 203 of Code of Criminal Procedure—Sections 190 (1) (b), 195 (1) (b) where applicable—Complaint for prosecution not made in writing by the Court where the “naraji” petition was filed—If a mere technical error,

Complaint—(Contd.):

Where a person is served with a notice to show cause why he should not be prosecuted for lodging a false case (an offence under section 211 of the Indian Penal Code) and he files a "naraaj" petition, this "naraaj" petition should be treated as a complaint within the meaning of section 4(h) of the Criminal Procedure Code and the trying Magistrate should dispose of it in accordance with the provisions of the Criminal Procedure Code.

Where the Magistrate after examining the witnesses of the petitioner finds that a *prima facie* case for prosecution has been made out, issues summons and observes that "This also disposes of the naraaj petition":

Held, that it was not a proper order of dismissal as under section 203 of the Code he should have recorded his reasons in brief.

The provisions of section 195 (1) (b) of the Code of Criminal Procedure apply to a case arising out of a petition of complaint whereas those of section 190 (1) (b) of the Code apply where no petition of complaint is filed; but as soon as section 195 (1) (b) comes into operation there must be a complaint in writing by the Court in which the petition of complaint was lodged or by some other Court to which such Court is subordinate, the default of which is not a mere technical error as otherwise the petitioner would have had a remedy by way of appeal under section 476B of the Code. **Satkari Ghose v. Ram Lakshman Dutt**

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Contract for sale—Suit for specific performance—Non-payment of full purchase money—Pleading—Continuous readiness and willingness to perform the contract—Transfer of Property Act (IV of 1882), section 53A.

Ordinarily non-payment of full purchase money is not a ground for denying the plaintiff's claim for specific performance of a contract of sale.

The plaintiff in a suit for specific performance has to allege, and if the fact is traversed, he is required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing of the suit, to perform the contract on his part.

The plaintiff in a suit for specific performance of a contract of sale cannot avail himself of the provisions of section 53A of Transfer of Property Act. It is available only to a defendant to protect his possession.

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Damages—*Fatal Accidents Act (XIII of 1855), sections 1, 2*—*Negligence*—*Performance of statutory duty*—*Liability for negligence, when arises*—*Contributory negligence*—*Test*—*Suit under Fatal Accidents Act*—*Who can bring*—*Plaint*—*One of the beneficiaries not joining in the suit*—*Damages, how calculated*

In the case of a public authority exercising statutory powers, there may or may not exist a duty to take care in favour of particular individuals. When such a duty exists, an individual who is injured by negligence in the performance of such a statutory duty has a right of action in respect of that negligence unless the statute expressly or impliedly excludes such liability.

The Fatal Accidents Act gives a right to the executor, administrator or representative of the person deceased to bring an action or suit, provided the death of the person was caused by wrongful act, neglect or default, which was as would have entitled the party injured to maintain an action and recover damages.

A plaint in a suit under the Fatal Accidents Act should not be carelessly drawn and should mention all the persons for whose benefit the suit has been brought and must further state the nature of the claim in respect of which damage is sought to be recovered.

Ordinarily there is no liability for negligence unless there is in the particular case a legal duty to take care. There must be an existence of legal duty to take care and secondly, the degree or amount of care

Damages—(Contd.):

which is obligatory. There are cases in which absolute liability has been imposed by law, namely, those who come within the rule in *Fletcher v. Rylands* and *John Rylands v. Thomas Fletcher*.

Ordinarily, in case of contributory negligence, there is negligence on both sides. The real test is whether any party could reasonably have avoided the consequences for the other party's negligence.

Knowledge of an existing danger or negligence is a very important element in determining whether or not a person is guilty of contributory negligence.

Under the Fatal Accidents Act, the right of action is not given to a certain class of persons. These are the executor, or administrator, or representative of the deceased. Representative has been explained as meaning not the legal representative but the wife, husband, parent or children. The right of action is not given merely to the relative as a class but to the individuals comprised in the class.

Under the Fatal Accidents Act, the suit must be brought for the benefit of the wife, husband, parent and children. Any one entitled to sue can bring the suit, but the suit must be brought for the benefit of these four specified class of persons.

As regards calculation as to damages the Fatal Accidents Act lays down in section 1 that a right has been given to ask for damages proportionate to the loss resulting from such death to the parties claiming such damages, that is, reparation for the loss caused to the beneficiaries mentioned in the Act. There must be a pecuniary loss sustained by the person claiming either actual or expected. Such pecuniary loss is evidenced by proof of a reasonable expectation of pecuniary benefit. There must be a certain amount of guess work in estimating such expectation, as various factors have to be considered which cannot be expressed arithmetically. At the same time sympathetic damages or solatium for loss of companionship are not relevant. The main criterion is the loss of reasonably expected pecuniary benefit. At the same time the probable earnings and future prospects of the deceased himself are to be taken into consideration, because the extent to which a person can benefit others depends largely on his earning capacity.

Generally and ordinarily, it is required under the Fatal Accidents Act that the share of each of the beneficiaries should be apportioned.

Under section 2 of the Fatal Accidents Act a suit can be brought for and recovery of damages for loss to estate.

A suit for damages under the Fatal Accidents Act was brought by the widow, two minor sons and a minor daughter of the deceased against the respondent, the Chittagong Engineering and Electric Supply Company, Limited. The father, though alive, did not join in the suit.

It was found as a fact that the deceased took his bath at the pipe water hydrant at Slim Road and when his body was wet he was coming back to the cloth shop of his father, where he worked as his father's assistant,

Damages—(Contd.) :

This shop adjoined the Road and there was a drain in between and a Veranda or raised platform next to it. An electric wire comes down to the ground from the pole and this has to be a dead wire, that is, a wire without current in it. Unfortunately this wire was a live wire.

The deceased was taking a short cut and as he was carrying a vessel containing water, he put his hand on the electric wire for support when getting upon the platform and was instantly killed. It was also found as a fact that there was negligence on the part of the defendant :

Held, that mere absence of negligence on the part of the deceased would not be sufficient to justify want of contributory negligence.

There was no contributory negligence on the part of the deceased by touching the wire, when his body was wet, as he was not doing anything which a person exercising reasonable care would not have done, and as he was not at all aware of any danger existing as a consequence of the defendant company's negligence.

That there was no ground for dismissing the claim for non-joinder of father.

As a special case the Court did not make any separate apportionment for the beneficiaries. *Sm. Jari Kumari Poddar v. The Chittagong Engineering and Electric Supply Company, Limited* ...

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—, *re-opening of—Bengal Money Lenders Act (X of 1940), section 36 (6) (a) (1)—Original obligation—Keeping alive in subsequent mortgages—New obligation, if created thereby and barring the application of proviso (i) of section 36 (1)—Original mortgage beyond 12 years from the date of the suit, if can be re-opened for accounts for new decree—“Suit” in proviso (i) of section 36(1), meaning of—Indian Contract Act (IX of 1872), section 62.*

Under section 36(1) of the Bengal Money Lenders Act, 1940, the Court, if it has reason to believe that the exercise of one or more of the powers under that section will give relief to the borrowers, shall *inter alia* re-open any transaction and take an account between the parties; and it can exercise these powers notwithstanding any agreement, purporting to close previous dealings and to create new obligations. Proviso (i) lays down that no adjustment or agreement, purporting to close previous dealings and create new obligations could be touched by the Court, if it was entered into at a date more than 12 years from the date of the suit by the parties or any person through whom they claim. It contemplates a case where the adjustment or agreement extinguishes the previous obligation and replaces it by another or substituted obligation, within the meaning of section 62 of the Indian Contract Act.

Whether a new mortgage bond under section 62 of the Indian Contract Act is to be taken in lieu of and in supersession of an old one depends entirely upon the intention of the parties and the intention is to be gathered from the facts and circumstances of each case.

When a renewed mortgage bond is taken, the mortgagee is always presumed, unless the contrary is shown to keep alive the original security which might be availed of against third parties. The presumption which arises in such circumstances can be put down expressly in the mortgage deed itself out of abundant caution.

Whether or not the original agreement was discharged by a new agreement as is contemplated by section 62 of the Indian Contract Act, must be determined on a consideration of the substance of the matter and not merely the form.

The word “suit” in the proviso (i) of section 36(1) of the Bengal Money Lenders Act, 1940, means either a suit to which the Act applies and in connection with which relief is claimed by the borrower under section 36 (b) of the Bengal Money Lenders Act or it means a suit brought by the borrower as contemplated by section 36(1) itself.

Decree—(Contd.):

In 1902 a mortgage deed was executed. In 1915 a second mortgage deed was executed in favour of the same mortgagee for a higher sum and the first mortgage was kept in force. There was no fresh advance on the second mortgage, but it was executed as a higher sum was found to be due after taking accounts. In 1928 a third mortgage was executed for a still higher sum and both the previous mortgages were kept alive. This time also there was no fresh advance of money but it was executed after taking accounts and the higher sum was found due. Then there was a suit for this mortgage and decrees were passed. In execution of the final decree the decree-holder purchased the mortgaged properties. The mortgagor thereafter started a proceeding under order 21 rule 90 Civil Procedure Code for setting aside the sale. During the proceeding the Bengal Money Lenders Act came into force. In September, 1940 the mortgagor presented an application for re-opening of the decree under section 36 (6) (a) (1) of the Bengal Money Lenders Act.

Held: There was no intention of the parties that the original obligation should be extinguished and merged in a new obligation and the obligation under the second instrument was not in suppression of but only in addition to or modification of the obligation created by the first document. This being the position the case is not hit by proviso (1) to section 36 (1) of the Bengal Money Lenders Act and the Court in giving relief under the Bengal Money Lenders Act is competent to re-open the second mortgage bond and direct accounts to be taken on the basis of the original loan. Proviso (1) is only an exception to the general rule embodied in the section and must be construed strictly.

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Execution—Composite decree—Decree for specific performance of contract for patni settlement and rent—Execution sought against other properties of the judgment-debtor—Bengal Tenancy Act (VIII of 1885), section 168A.	
In a suit for specific performance of the contract for patni settlement and for a money decree either for rent or for damages by the superior proprietor of the tenure, following decree was passed : The prayer for specific performance was allowed and the plaintiff would get the amount claimed. This decree was sought to be executed and so far as the money portion was concerned, execution was sought to be levied against properties other than the tenure in suit. The objection of the appellants judgment-debtors was that under section 168A of the Bengal Tenancy Act, the decree being one for arrears of rent, could not be executed by the attachment or sale of any property of the judgment-debtors other than the tenure to which the decree related :	
<i>Held</i> , that the decree was not passed for any sum of money on account of damages but for amount as rent and was linked up with the decree for specific performance.	
That the decree-holder was not entitled to break up the integrity of the decree and treat the money decree a simple money decree.	
That in so far as execution was concerned with the realisation of the sum decreed out of other properties of the judgment-debtor, under section 168A of the Bengal Tenancy Act the decree-holder could not realise the money out of other properties of the judgment-debtor. He could realise it by attachment or sale of the tenure (patni) in suit.	
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Gaming—*Calcutta Police Act (IV B. C. of 1866), section 44, prosecution under—Section 3—‘Instruments of gaming’, definition of—Section 47, presumption under—‘Common gaming house’, the requisite elements of—Instruments seized in course of a search on a warrant duly issued under section 46 of the Act—Distinction made in the matter of framing a charge under sections 44 and 45 of the Act—‘Person using the place’ and ‘person frequenting the place’, if both guilty under the Act.*

The principal questions for decision by the Full Bench were as follows :—

1. Do the words “for the profit or gain of the person owning &c. &c.” in the definition of “common gaming house” imply that it must be proved that profit has been made by the owner or that profit to the owner is inevitable, or is it sufficient, if the owner or occupier &c., expects or hopes to make a gain or profit from the use of the ‘instruments of gaming’.
2. Do the words “whether by way of charge for the use of such house &c. or instruments or otherwise” mean that the profit to the owner &c. must accrue by way of charge for the use of the house &c. or instruments, and that profit simply from the gambling is not enough.

Held, after overruling *Rangalal Sen’s* case, that it is impossible to read into the various definitions embodied in the Calcutta Police Act, as are relevant for deciding a case under section 44 of the Calcutta Police Act, a requirement that a profit has actually been made or that it must be inevitable to be made. It would ordinarily be quite proper to adduce evidence to prove that profit had actually been made; the phrase ‘kept or used for the profit or gain of the person’ simply implies that the person running the premises hopes to make a profit or gain by keeping or using the instruments of gaming; it does not mean that there must be proof that such a profit has been made or most inevitably be made.

The object of sections 44 and 45 of the Calcutta Police Act is to restrict or suppress gambling in some forms, and for the purpose to prevent places being run as ‘gaming dens’. The only reasonable explanation of the phrase “whether by way of charge &c.” in the definition is that the legislature wished not to restrict the meaning of the words used

Gaming—(Contd.):

but to give them their widest meaning, and to make it clear that the profit or gain might accrue to the person either directly or indirectly.

It is sufficient, in all cases, to maintain a conviction under section 44 of the Calcutta Police Act, if the person referred to in the definition *expects* to make a profit or gain from the actual gambling.

In cases in which warrant has been issued under section 46 of the Calcutta Police Act, the presumption may be made under section 47 of the Act, that the articles or instruments recovered were kept or used for the profit or gain of the person owning, occupying or frequenting the premises, within the meaning of the section, and it will then be for the accused to prove that he did not hope for or expect any such gain or profit. Superintendent and Remembrancer of Legal affairs,

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Hindu lady—Deed of surrender, not a transfer—Article 33, Stamp Act (II of 1899), no application—Pardanashin lady, deed by—Court's duty to satisfy itself about such transactions—Undue influence, principles to decide—Independent legal advice, meaning of—General principles—Bona fide purchaser for value without notice—Equity against—General principles.

Deed of surrender does not in law or in fact purport to transfer any property. The Hindu widow merely withdraws herself from the estate and the next heir steps into the inheritance as a matter of law without any consent or acceptance on his part. The basis of the doctrine of surrender is the self-effacement of the widow's interest, and not the *ex facie* transfer by which such effacement is brought about.

The interests obtained by undue influence cannot be held by third parties although innocent of fraud. But no equity can be enforced against a person who is a *bona fide* purchaser for value without notice.

It is the duty of the Court before upholding transactions with a Pardanashin lady to satisfy itself that the lady had sufficient intelligence

Hindu lady—(Contd.):

to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed and that there was no undue influence or misrepresentation.

Independent legal advice is certainly not in itself essential. What is necessary to establish is that the import of the document was brought home to the mind of the grantor and that she really understood and meant to make the transfer. If the settlor's freedom and comprehension can be established by evidence or if it is proved that the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor and were then substantially embodied in deed, there would be nothing further to be gained by independent advice.

It is enough if the general result of the transaction is understood by the lady, it is not necessary that she should understand each detail of a matter which might be involved in legal technicalities.

If those founding on a deed by a *pardanashin* woman fail to show that the grantor intelligently understood the deed there is an end of the matter. But even if intelligent understanding of the deed is established, a question of undue influence may still arise.

Such influence may be direct and expressly used by the decree for the purpose, or the relation between the donor and the donee may be such as to raise a presumption of undue influence.

Where more undue influence is alleged it is necessary to examine very closely all the circumstances of the case. The principles are always the same though the circumstances differ, and as a general rule the same questions arise. The questions enunciated are: (A) Was the transaction a righteous transaction, i. e., was it a thing which a right minded person might be expected to do? (B) Was it an improvident Act? that is to say does it show so much improvidence as to suggest the idea that the lady was not mistress of herself and not in a state of mind to weigh what she was doing? (C) Was it a matter requiring a legal adviser? (D) Did the intention of making the gift originate with the donor? *Sreemati Karunamoyee Debi v. Sreemati Mayamoyee Debi*

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Hindu Law—Debittar—Shebait—Managing shebait of a family deity granting lease for legal necessity to some of the other shebait—Lessees sold their interest to the plaintiff—Plaintiff dispossessed by the new lessees of the village committee who claimed the deity as village deity—Former lease, if valid—Managing shebait, powers of, if like a trustee—Deed of dedication, if can confer larger powers—Remand on the points vis., (1) Whether the managing shebait in a particular institution had power of granting leases and (2) Whether, on evidence, there was legal necessity—Decisions thereon, if questions of fact and if can be challenged in second appeal—The question of the validity or otherwise of the said lease, if should be allowed to be raised for the first time in appellate Court, when it was not raised nor any issue framed thereon in trial Court.

Hindu Law—(Contd.):

Although shebais are not strictly trustees, yet the same principles which are applicable to trustees are applicable to shebais in the matter of alienations and bringing of suits.

Ordinarily a managing shebait has the powers of management only *i. e.*, to manage the worship and carry on the day to day administration of the affairs of the Dety but in a particular deed of dedication he may be given larger powers and there would be nothing illegal in it.

When a case is remanded to the lower Court on the points *vis*, whether the managing shebait in a particular institution had power of granting leases and whether on evidence there was legal necessity for the same, the decision thereon was on questions of fact and cannot be challenged in second appeal.

The question *vis*, whether the lease granted by the managing shebait to some of the other shebais is valid or not should not be allowed to be raised for the first time in appellate Court when it was not raised nor any issue framed thereon in trial Court.

A trustee can buy from *cestui que trust* but such a purchase would not be upheld by the Court unless the purchaser trustee shows, and the onus is on him, that he did not take advantage of his position as trustee and made the fullest disclosure at the time of the bargain and questions of fact would necessarily arise in such cases. *Gostha Behari De v.*

Purna Chandra De ...

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Hindu widow—Maintenance right, if lost its original character—Deed of agreement; see Income tax ...

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Holding, division of—Bengal Tenancy Act (VIII of 1885), sections 26F, 88—Right of pre-emption by co-sharer tenant—Express consent in writing by the landlord and each of the co-sharer tenants, whether must be made at the same time and in the same transaction.

The sole tenant of an occupancy holding comprising two C. S. daga makes a division of it and sells the lands of the two daga thus separated to two different persons at different dates. The sole landlord recognised the new tenants of the two new separated holdings and granted receipts to each for the apportioned rent in his share. One of the new tenants sells his interest to a third party. The other new tenant claims the right of pre-emption:

Held, that there must be a consent to the division at one time but the consent in writing need not all be expressed at the same time.

That the express consent in writing given by the sole landlord at the time of division in 1942, that given by one of the two co-sharer tenants in October, 1943 and that by the other in February, 1944 were sufficient for the purposes of section 88 (1) of the Bengal Tenancy Act to effect a valid division of the holding. *Bithikaran Tarwai v. Khudram Chakravarty* ...

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House Rent Control Order, Para 9 A(1), second part of, construction of; see License ...

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House Rent Control Order, Para 9(4), If excludes a tenant from taking up a plea under Para 9 A ; see License	...	...	81
Income tax— <i>Indian Income Tax Act (XI of 1922), section 14(1)—Maintenance allowance under an agreement between Hindu widow and coparceners of joint Hindu family—Nature of Hindu widow's right to maintenance.</i>			

The widow of a deceased coparcener in a joint Hindu family governed by Mitakshara law has a right of maintenance against the surviving coparceners of the joint family *qua* the share of her deceased husband which they take by the rule of survivorship. This is an absolute right which accrues to her as a member of the joint family. It does not form a charge on the properties of the family, but when necessary, it may be made into a charge on a specific portion of the joint family properties not exceeding her husband's share. Separate maintenance may be provided for by an allowance of money or by an assignment of land.

A widow of a member of a Mitakshara Hindu undivided family, who was receiving certain amount of money per month for maintenance under an agreement with the male members of the family, up to the date of disruption of family by partition and thereafter from some of the separated members of the said family, is entitled to claim exemption from payment of income tax with respect to that amount under section 14(1) of the Indian Income Tax Act, 1922, after the disruption of the undivided family.

If a Hindu widow proves that she is receiving the allowance in question by virtue of her right or in her capacity as a member of the Hindu undivided family, then she is entitled to claim the benefit of section 14(1) of the Indian Income Tax Act, 1922. The coparceners can break up the family, but they cannot by so doing deprive the widow of her right to receive the maintenance as a member of joint family.

In the course of mutation proceedings, a widow of a member of joint Hindu family came to a compromise and a deed of agreement was executed, whereby the widow acknowledged her status to be that of a widow in a Hindu undivided family, and further declared that as such she was not entitled to the estate of her husband. It was provided by this document that the male members would pay as maintenance allowance a sum of Rs. 1000 per mensem to her. It was also provided that in order to secure payment of the allowance to the widow the male members would be personally responsible and their property moveable and immoveable would both be liable :

Held, that the maintenance right of the widow had not lost its original character of what was due to her from the income of the joint family as a member of the Hindu undivided family. The Commissioner of Income Tax v. Musammat Bhagwati

Incumbrance— <i>Nishar tenancy created by tenant-holder under the settlement-holder—Bengal Tenancy Act (VIII of 1885), section 161—Annulment—Creation of Nishar tenancy, effect of.</i>	...	...	310
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Incumbrance—(Contd.):

In order that a tenancy may be an incumbrance in accordance with law, it must be an interest which the tenant is capable of creating. The interest of Niskar-tenant which the tenure-holder under the settlement-holder of a temporarily settled estate in the Sundarban area created was not altogether void.

A Niskar tenancy is a tenancy and a sub-tenancy comes within the definition of an incumbrance as given in section 161 of the Bengal Tenancy Act. The purchaser in execution of rent-decree against the tenure-holder must therefore annul the incumbrance before he can claim possession.

If the tenure-holder's interest has come to an end by efflux of time or otherwise, it would be open to the settlement-holder to have appropriate remedy allowed to him by law. **Manmatha Pal Choudhury v. Kartick Chandra Basu** ... 149

Indian Companies Act, section 132 (1)—Balance sheet—Nature and value of assets and liabilities—Form of Balance sheet; *see Mens Rea* ... 296

—, section 282—Anomalous character of loan—Loan not secured by formal deed of mortgage but entered in Balance sheet as secured—Director, if can be said to have known the description to be false; *see Mens Rea* ... 296

—, section 282—Element of *Mens Rea*, import of; *see Mens Rea* ... 296

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Indian Income Tax Act, section 14(1)—Hindu widow, when can claim the benefit—Coparcener breaking up the family; *see Income tax* ... 310

—, section 14 (1)—Widow of a member of a Mitakshara Hindu undivided family—Receipt of certain amount of money per month for maintenance under an agreement with the male members of the family up to the date of disruption of family by partition and thereafter from some of the separated members of the said family; *see Income Tax* ... 310

Indian Lunacy Act and powers of High Court under its Letters Patent; see Lunacy ... 210

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Indian Registration Act, sections 72, 73, 75—Suit under section 77—Seeking registration in a different registration office; *see Jurisdiction* ... 199

—, section 77—"Is sought to be registered"; *see Jurisdiction* ... 199

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—, section 77, suit under, nature of ; <i>see Jurisdiction</i>	199
—, section 77, suit under—Plaint with insufficient court-fee—Civil Procedure Code, Order 7 Rule 11 (6), section 148 ; <i>see Jurisdiction</i>	199
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Interpretation of "Previously existing right" occurring in U. P. Encumbered Estates Act ; see Ultra vires	347
Jurisdiction—Land Acquisition Act (I of 1894), section 18—Reference apparently by some of the claimants but virtually by all—Mitakshara joint family—Method of valuation of land—Calcutta Improvement (Appeals) Act (XVIII of 1911), section 3.	
In the circumstances of the present case, the Acquisition Collector acted within his jurisdiction in going beyond the reference made under section 18 of the Land Acquisition Act and increasing the Collector's award in favour of the claimants who did not make the reference, in the reference made by other claimants.	
As to the method of valuation of land, no hard and fast rule can be laid down, each case must be considered in view of its own special features : It was contended that the Calcutta Improvement Tribunal should have determined the basic rate per cottah on the private sale proved in the case and not on the accepted awards :	
<i>Held</i> , that this was a matter of appreciation of evidence and of the weight to be attached to it and not a matter of principle of law or procedure which could be urged in an appeal of a limited scope as like the present one, namely, a valuation case. The Province of Bengal v Joy Narayan Fatepuria	18
Jurisdiction—An assignment of decree in Calcutta—Leave to sue in the Original Side of the High Court obtained ; see Appeal, if lies	131
—High Court—Bengal Alienation of Agricultural Land (Temporary Provisions) Act (V B C. of 1944), section 4 (3)—Verified statement under, if a necessary prerequisite for Collector's jurisdiction—Section 10—Exclusive jurisdiction of Collector—Revision by District Judge, final.	
<i>Held</i> ; That the existence of a verified statement as required under section 4 (3) of the Bengal Alienation of Agricultural Land (Temporary	

Jurisdiction—(Contd.):

Provisions) Act, is not an essential prerequisite for Collector's jurisdiction as the petitioner is not debarred from proving his statements by adducing evidence.

That if the subject matter of the proceeding before the Collector was one which he was empowered to dispose of under the Act, the jurisdiction of the High Court and of all civil courts are altogether excluded.

The only remedy provided by the Act against the order passed by the Collector, is an application to the District Judge but the order passed by him thereon shall be final.

If a party can establish that the subject matter of the proceeding before the Collector was one which he was not empowered to dispose of under the Act but that the Collector had yet proposed to do so, the High Court would have jurisdiction to interfere not however with the order of the Collector as such but with the order of the District Judge passed in revision if he too upheld the order. *Bholanath Dutt v. Laya Majhi*

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— *Indian Registration Act (XVI of 1908), section 77—Suit under—Filing of plaint within 30 days but with insufficient court-fee—Code of Civil Procedure (Act V of 1908), Order VII Rule 11 (c), section, 148—"Is sought to be registered" in section 77 of Registration Act, interpretation of—Sections 72, 73, 75.*

Where in a suit under section 77 of the Indian Registration Act, the plaint with insufficient court-fee was filed within 30 days:

Held, that Registration Act does not deal with Civil Procedure and section 148 and Order 7 Rule 11 (c) of the Civil Procedure Code deal with insufficiently stamped documents not excluding the plaints.

The effect of section 77 read with the section to which it refers is to make the civil suit a kind of appeal against the decision of the registration authorities. The section does not merely give an abstract right of suit on the happening of certain events; it provides for a further stage of proceedings of which the previous course has been dealt with by the previous sections.

The cause of action for the suit arises on the refusal of the registration authorities to register a deed.

There is nothing in section 72 or 73 or 75 of the Registration Act, from which it can be argued that the proceeding before the Registrar and so a suit under section 77 are proceedings independent of the proceedings before the Sub-Registrar so that there is no bar against seeking registration in a different registration office.

The office "in which the document is sought to be registered", as contemplated by section 77 is the office where the document was presented for registration. It is in that office that the document must be sought to be registered in the suit as well and the suit can be brought only in the Court within the jurisdiction of which such office is situated—if the document was presented in a wrong office, the suit must still ask for

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registration there, but in such a case it will be futile to bring a suit, since the Court cannot direct registration by an officer which has no jurisdiction. Purna Chandra Ghose v. Sm. Kiran Bala Ghose ...	199
———— <i>Indian Contract Act (IX of 1872), section 28—Agreement in restraint of legal proceedings, if valid.</i>	
Where in a suit for damage in connection with a contract for supply of shoes brought in the Munsiff's Court at Dacca which has ordinarily to hear such suit, it was contended by the defendant that by a clause in the contract that "any legal action resulting from this contract will be taken in the Courts of Calcutta," such jurisdiction has been taken away:	
<i>Held</i> , that the Munsiff of Dacca has jurisdiction to hear the case. The Court is inclined to the view that the agreement is void as it is within the mischief of section 28 of the Contract Act. Chittaranjan Guha v. Parul Rani Nandi ...	224
———— <i>Application for execution, where to be made—Munsiff specially empowered under Village Self Government Act (I. B. C. of 1899), section 91 sub-sections (1) and (2)—Union Court granting a decree unable to effect satisfaction—Certificate under sub-section (1) of the section—Decree-holder intending to apply for execution in the Civil Court—If empowered by a notification under section 19(2) of the Bengal, Agra and Assam Civil Courts Act (XII of 1887) to try suits under section 13 of the said Act.</i>	
Section 91(2) of the Village Self Government Act has not in view the provision of section 19(2) of the Bengal, Agra and Assam Civil Courts Act but that of section 13 of the Act by which the local limits of jurisdiction of a particular Court are fixed and determined.	
<i>Held</i> , that a decree-holder obtaining a decree under sub-section (1) of section 91 of the Village Self Government Act intending to execute the certificate obtained thereunder must file the execution petition under sub-section (2) of section 91 of the Act in the Court of the Munsiff within the local limits of whose jurisdiction the Union Court is situated (under the provisions of section 13 of the Bengal Agra and Assam Civil Courts Act) and not in the Court of the Munsiff specially empowered under sub-section (2) of section 19 of the Bengal Agra and Assam Civil Courts Act. Sheikh Salimuddin v. Dalluddin Minor ...	262
———— of extra-provincial nature, if can be assumed by special Judge purporting to act under U. P. Encumbered Estates Act; <i>see Ultra vires</i> ...	347
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Landlord and tenant, relationship of, is necessary for exercise of the right to bring a tenure or holding to sale under section 65 of the Bengal Tenancy Act; <i>see</i> Tenure, sale of	363
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——, question of—Reasonableness of custom, after finding of fact; <i>see</i> Lost grant	167
Lease, construction of—Provision for payment of rent by paddy or a sum of money in lieu thereof—Precise question raised in Court; <i>see</i> Second appeal	125
—— Construction of— <i>Demising tank for rearing fish and the bank to plant and cut down trees—One instrument containing two leases—Lease of land with trees standing thereon—Lessee's enjoyment—Maintaining garden and trees standing thereon—Development of land as garden.</i>	
Where lands on the banks of a tank are demised, as such, for the purposes of cultivation and the demise of the tank is attached thereto generally in aid of the cultivation of the banks, whether expressly or by implication, the lease is for agricultural purposes but where the lease of the tank is for rearing fish therein with a right to cut down trees from and plant trees on the bank, it cannot be a lease for agricultural purposes.	
Where two distinct properties are demised by the same instrument and indeed by the same sentence in the same instrument, it is hardly likely that the parties would be contemplating a tenancy for one purpose in respect of one of the properties and a tenancy for quite a different purpose in respect of the other property.	
If a piece of land with trees standing thereon is let for enjoyment by the lessee merely by cutting down the trees which may be standing on the land or by planting new trees, whether such trees be fruit trees or merely trees yielding timber, there would be no lease for agricultural or horticultural purposes.	
Where the lease is generally for maintaining the garden and trees therein as it was with the right of planting new trees if the lessee so chose, but the purpose was not that the land would be developed as a garden, it is not for agricultural or horticultural purpose. <i>Baldya Nath Chakravarti v. Krishna Bhugan Dan</i>	145

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Lease, construction of—Two distinct properties dismissed by same instrument—Tenancy; <i>see</i> Lease	145
——, If for agricultural purposes—Demise of tank for rearing fish and of bank for planting and cutting down trees; <i>see</i> Lease	145
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License—*Calcutta House Rent Control Order (1943), sections 9(1), 9(4), 9 A(1)*—*Lease and licence, difference between—Indian Easements Act (V of 1882), section 52—Licence—Arrangement by letter whereby "compensation" per month was provided for "temporary accommodation"—Tenancy, if created—Defaulter tenant—Permission of Rent Controller, if necessary.*

If the terms are equally consistent with a license and a lease, the intention of the parties may be a useful and legitimate guide in determining the relationship actually created. But if in the case of a written document the rights actually transferred exceed those of a license and make out a lease, it is quite impossible to reduce a lease to a license by speculating as to what the lessor might really have intended. If he intended less, his acts exceeded his intention and by the consequences of his acts he must abide.

Where the owner transfers the rights of ownership in a way which extinguishes their enjoyment by him and vests the enjoyment exclusively in the transferee an interest in the land is granted; but where the owner retains the rights of ownership but only subjects them to restrictions to the extent that some of the rights are transferred to another, then what he grants is either a license or an easement, but not an interest in land.

On a proper interpretation of the agreement wherein the words "temporary accommodation" and "compensation per month" are used avoiding the words "tenancy" and "rent per month", the status granted to the defendant was that of a tenant.

It is undoubtedly one of the common errors as to paragraph 9 (4) of the House Rent Control Order to suppose that a defaulter is not entitled to any benefit under the order at all. What the sub-paragraph actually provides is that the defaulter will not be entitled to claim the benefit of "this paragraph", that is to say, paragraph 9. The requirement as to the permission of the Rent Controller is contained not in paragraph 9

License—(Contd.) :

but in paragraph 9A which is independent of paragraph 9. Paragraph 9 (4), by itself, cannot therefore be a reason for excluding a tenant from taking up a plea under paragraph 9A.

The second part of paragraph 9 A (1) can have application only where the Court can pass a decree, if at all, by relying on clause (c) of the proviso to paragraph 9, that is to say, by holding that the immunity from ejectment which the tenant has otherwise established under the House Rent Control Order, is, on the facts of the case, overborne by the personal needs of the landlord or some other satisfactory consideration. It cannot apply where, the tenant being a defaulter, he is excluded from the benefit of paragraph 9 and therefore a decree can be passed under the general law, without the support of the special reason provided for in clause (c) of the proviso to that paragraph.

The defendant having been found to be a defaulter, permission of the Rent Controller was not necessary in the present case which was pending when paragraph 9A came into operation. *O. C. Ganguly v. Kamalpat Sing Dugar*

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—— *Transfer of Property Act (IV of 1882), section 53—Transfer of property by judgment-debtor for consideration—Test—Reference to some creditor—Burden of proof—Intent to defeat or delay—Good faith*

In order to succeed under section 53 of the Transfer of Property Act it must be established that the vendor or the transferor acted in the matter with the intent to delay or defeat his creditors generally, that is to say, all his creditors. If the transferor intends to prefer some creditors of his, that is to say, to pay out of the consideration money some of his creditors in preference to others and even with the firm intent of not paying at all those others, the case would not come within section 53.

The onus to prove the fraudulent intent, that is to say, the intent on the part of the transferor to defeat or delay his creditors generally, is on the persons who challenge the transaction under section 53. If they establish that that intent was present in the transferor, then the transferee will have to show, in a case when the transfer was for a consideration, that he had acted in good faith.

The mere fact of the general knowledge that the transferor was in financial embarrassment would not, by itself, establish want of good faith on the part of the transferee. Assuming that there was fraudulent intent on the part of the transferor, it cannot be said that the transferee was taking the conveyance mala fide, unless it is established that she knew of that fraudulent intent or was a party to the conspiracy for cheating the creditors. If she took the conveyance in the belief that the price would be paid to the pressing creditors, there could be no mala fide on her part. *Rajbari Bank Ltd. v. Rani Harshammukhi Singha*

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Lien—Salvage Lien—Putni Regulation (VIII of 1819) section 13 cl (4) deposit by darpatnidar under, if creates a salvage lien *i. e.*, a first charge—Darpatnidar takes over possession under section 13 cl (4)—Further relief on basis of salvage lien, if can be allowed—Election—Bengal Tenancy Act (VIII of 1885), section 171—Rent, a first charge—Section 195, if effects the rights and incidents of putni tenures governed by previous enactments in force—The words “salvage lien” used in Privy Council decision in *A. H. Forbes v. Maharaj Bahadur Singh*, if gives mere description of the lien or carries the actual incidents attached to it—Darpatnidar’s deposit, if creates, a salvage lien independently of section 13 cl (4) of Regulation VIII of 1819—Sale of Land for Revenue Arrears Act (I of 1845), section 9, deposit under, if creates such lien—Excess Profits Tax Act (XV of 1940), section 7, effect of—Transfer of Property Act (IV of 1882), sections 59A, 72—Darpatnidar, if entitled to add the amounts of his subsequent payments to the original deposit by him—The order in which the disbursement of receipts of rent is to be made by the depositor darpatnidar in possession.

The deposit made by Darpatnidar under section 13 cl (4) of Regulation VIII of 1819 created a lien but not a salvage lien *i. e.*, a first charge having priority over the pulse mortgagees.

A darpatnidar making such a deposit would have to elect whether to claim relief provided by the Regulation or that in the nature of salvage lien such as given by section 171 of the Bengal Tenancy Act; but once he elects to claim relief under the Regulation by taking possession of the putni tenure he cannot claim the other relief also.

Rent which would be a charge prior to most other charges under section 171 of the Bengal Tenancy Act would not have priority over darpatnidar’s lien under section 195 of the said Act which provided that nothing in the Act should affect any enactment, previous to it, relating to putni tenures so far as it relates to those tenures.

The words “salvage lien” used in the Privy Council decision in *A. H. Forbes v. Maharaj Bahadur Singh* were used merely as descriptive of the right and do not carry all the incidents attached to it known to Maritime Law or to the Irish Courts.

No “salvage lien” independent of statute was created by the darpatnidar making a deposit. It follows therefore that the darpatnidar merely obtained a lien which would be postponed to all the prior mortgagees.

A mortgagee making deposit under section 9 of Act I of 1845 of arrears of government revenue and thereby preventing the estate from being sold for arrears can recover the same with interest from the proprietor but no equitable lien on the estate is created thereby.

Though section 7 of Bengal Act XV of 1940, in effect, amended section 13 of the Regulation VIII of 1819 by adding two clauses providing for “salvage lien” of the nature of that provided by section 171 of the

Lien—(Contd.):

Bengal Tenancy Act, yet it does not follow that the legislature regarded the original section as giving to the darpatnidars rights as extensive as those conferred by the amendment on other persons whose interests are affected.

The darpatnidar is entitled under section 72 of the Transfer of Property Act to add the subsequent payments to his original deposit.

The mortgagee in possession can spend the income in any way agreed upon between him and the mortgagor provided the securities of the prior mortgagees are not thereby imperilled.

The darpatnidar making the deposit under section 13 cl (4) of Regulation VIII of 1819 should disburse the amount of rent received in the following order:—

- (1) payment of expenses of collection,
- (2) payment of patni rent to zamindar,
- (3) purchaser of subordinate tenures, if requested to do so by the patnidar,
- (4) liquidation of his claims against the patnidar for advance made subsequent to his original deposit, and
- (5) payments towards the original deposit. *Midnapore Zemindary Co. Ltd v. Saradindu Mukhopadhyay*

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Life-tenant, if can be charged for waste—Permanent injury by the life-tenant to the vested reversionary right; *see Sult*, if lies

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———, if can be charged for waste by the remainderman when the subject-matter is not immoveable property; *see Sult*, if lies

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———, if trustee for remainderman for goods in her possession; *see Sult*, if lies

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——— selling ornaments to the prejudice of reversioner—Conversion; *see Sult*, if lies

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Limitation—Bengal Agricultural Debtors (Amendment) Act (B. C. of 1942), section 37A sub-section (2)—Possession of property delivered to decree-holder—Decree-holder leases out the same—Application by judgment-debtor under section 37A against decree-holder in time—Petition by judgment-debtor more than a year after the relevant date to Debt Settlement Board for addition of the lessees as parties—The lessees added as parties—Affirmed by Appellate Officer and District Judge—Revision to High Court, if lies.

Held: That the application by the judgment-debtor to the Debt Settlement Board against the decree-holder was within the time mentioned under sub-section (2) section 37A of the Act but the petition for relief against the lessees by adding them as parties was barred by limitation as it was made beyond the period allowed. *Basanta Kumar Roy v. Taheraddi Mondol*

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——— **Civil Procedure Code (Act V of 1908)**, section 47—Limitation Act, Schedule I, Article 182 (2)—Time, if runs from the date when the appeal against order rejecting an application to set aside an *ex parte* decree was passed—Estoppel—Objection to execution—Service of notice under order 21 rule 22 of the Code of Civil Procedure (Act V of 1908).

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Limitation—(Contd.):

An appeal from an order rejecting an application to set aside an ex parte decree under order 9 rule 13 Civil Procedure Code does not extend the period of limitation for execution of the decree under article 182,2) of the Limitation Act.

If a notice under order 21 rule 22 of the Code of Civil Procedure was actually served upon the judgment-debtor and he was apprised of the fact that the decree-holders had started proceedings for execution of the decree by delivery of possession of the properties and if in spite of the notice he remained silent, he cannot at a subsequent stage of the proceeding raise the question of limitation which must be deemed to have been decided against him when the Court made the order for execution. **Haris Chandra Chowdhury v. Dines Chandra Chowdhury** 226

— Possession of execution purchaser at mortgage sale—Mortgage by manager of endowed property; see Adverse possession 238

— Res judicata, principle of—Adjudication—Order for execution—Plea of limitation not put forward—Order directing sale proclamation to issue—Absence of attachment—Absence of notice under order 21 rule 22 of the Code of Civil Procedure (Act V of 1908), order for execution under order 21 rule 66 of the Code of Civil Procedure—Entry in order sheet—Evidence of service of notice—Evidence Act (I of 1872), section 35.

Entry in order sheet of service of notice is evidence of fact of service of notice under section 35 of the Indian Evidence Act.

The appellant obtained a final decree in a mortgage suit on 6th September, 1938. He started execution proceeding on 7th September, 1942. Notice under order 21 rule 22 of the Code of Civil Procedure was directed to be issued and it appeared from order sheet, dated the 7th January, 1943 that the notice under 21 rule 22 Civil Procedure Code had been served prior to that date:

Held, that the Court in passing its order on the 7th January, 1943 was of opinion that the decree was executable and further process in execution might be taken. The order necessary implied an adjudication that the decree at the time was capable of execution:

That the order dated the 7th January, 1943 stood unchallenged and was not set aside by the judgment-debtor. The fact that the execution case was dismissed for default at a later stage did not matter:

That the judgment-debtor was precluded by the order dated the 7th January, 1943, from raising the bar of limitation in subsequent execution case on the ground that the previous execution case was filed beyond time.

That an order passed in subsequent execution proceeding directing sale proclamation to issue proceeded on an implied adjudication that the decree was executable and precluded the judgment-debtor from raising the bar of limitation in the subsequent execution proceeding.

The absence of an attachment was not material in determining the ques-

Limitation—(Contd.) :

tion whether or not the order previously made directing the execution to proceed, involved an adjudication that the decree was executable :

Absence of notice under order 21 rule 22 of the Code of Civil Procedure did not bar the subsequent execution. Notice under order 21 rule 66 of the Code of Civil Procedure could be issued without serving any notice under order 21 rule 22 of the said Code. *Aswini Kumar Das Gupta v. Karamat Ali Kha* 278

Limitation Act, section 10—Suit by reversioner for compensation for loss of Chattel ; *see* Suit, if lies 173

—————, Schedule I Articles 36, 49—Suit by reversioner for compensation for loss of chattel against the life-tenant ; *see* Suit, if lies ... 173

—————, Schedule I Article 48, scope of ; *see* Suit, if lies ... 173

—————, Schedule I Article 134A to 134B—Possession of execution purchaser at mortgage sale—Mortgage by manager of endowed property ; *see* Adverse possession 238

—————, Schedule I Article 182(a)—Appeal from order rejecting an application to set aside an *ex-parte* decree under Order 9 Rule 13 Civil Procedure Code, if a ground for extending the period of limitation for execution of decree ; *see* Limitation 226

Loan—Principal of Bengal Money Lenders Act (Act X B. C. of 1940), section 36(a) clause (a)—*What is to be regarded as the principal of a loan—Adjudication between the parties fixing the amount of the principal, if can be re-opened in a proceeding for relief under section 36 of the Act—Form of decree, what it will be—Ex-parte decree, setting aside of—Decree against other defendant made final—Decision, if can be reviewed in the application by the judgment-debtor.*

In a proceeding under section 36 of the Bengal Money Lenders Act, the Court has to determine what is to be the principal of the loan. That term has been defined to be the actual advance in money. Ordinarily the principal of the loan must be taken to be what had been actually advanced but if there has been already an adjudication between the parties as to what amount represented the principal of the loan that adjudication cannot be re-opened in a proceeding for relief under section 36 of the Bengal Money Lenders Act.

The decree-holder brought a suit on his mortgage against the judgment-debtor and another person. This suit was decreed against the judgment-debtor and *ex-parte* against A for Rs. 4500 and it was held that the consideration money was Rs. 4500. A applied for setting aside of *ex-parte* decree and the decree was set aside as regards him. In the decree it was expressly declared that the decree against the judgment-debtor stood for Rs. 4500. The judgment-debtor allowed the decree against him made final. As the execution was pending when the Bengal Money Lenders Act, 1940, was passed, the judgment-debtor wanted that the mortgage was only entitled to execute the decree for Rs. 262 :

Loan—(Contd.):

Held that it was not open to the judgment-debtor in an application under section 36 of the Bengal Money Lenders Act to ask the Court to go back upon the decision in the original judgment on those issues which were found against him.

The judgment-debtor was ordered to pay the decretal amount by 12 instalments.

As all the properties were purchased by the decree-holder himself the decree would be in the first form that is to say, if the mortgaged properties, if not already restored to the judgment-debtor would forthwith be restored to him. In default of payment of any one instalment those properties would be restored back to the decree-holder purchaser. The judgment-debtor was further ordered to go on paying rent and cess regularly and in default the properties were to be restored back to the decree-holder purchaser. *Indra Shekhar Chakravarty v. Rati Kanta Halder* ...

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Lost grant—Presumption—Right of cremation—Evidence to dispute such grant, if permissible—Inhabitants of a village, if can be grantees of such grant—Essentials of a valid custom—Custom, whether must be universal or compulsory—Evidence of reasonableness of custom, if a question of law—A decree for possession for exercising right of cremation or burial only against the owner, if bad in law.

Held: That that principle underlying the doctrine of lost grant is that when a certain right is found to have been exercised for a long period of time without interruption to the derogation of the right of some one else the law, instead of disturbing such possession supports for it the best beginning that the law can give. It is, therefore, presumed as a kind of fiction that although no legal origin of the user which has been established as a fact can directly be proved it may legally be presumed that the originally lay in a grant made but since it was made, lost.

When the facts attract the doctrine of lost grant it is not permissible to give evidence to prove that such grant was never made, but the presumption cannot be drawn when it is clear that no grant could legally be made at all. In order that there could be a grant, it is necessary that there must have been a grantee capable of taking. Clearly the inhabitants of a village who are an indeterminate and uncertain body of persons could not be grantees of any kind.

A valid custom in order to be enforceable must refer to a particular plot of land or locality, to the particular nature of right enjoyed, to the particular persons in derogation of whose rights it is exercised and to a sufficient long user and it must also be reasonable.

A custom need not be universal nor compulsory. The fact that the people of a locality have enjoyed a custom does not mean that they are bound to exercise and follow it on every possible occasion and that if they do not do so on some occasions, the existence of the custom is negatived.

Lost grant—(Contd.):

After the facts have been found, a question of the existence or reasonableness of the custom is a question of law. It cannot, therefore, be improper to decide the question of law in second appeal.

A decree for possession over certain plots of land for exercise of certain rights over these viz., the right of cremating and burying the dead bodies in derogation to the absolute right of the owner for khas possession is neither misleading nor bad in law. *Jamila Khatun v. Kshetra Mohon Biswas* 167

Lost grant, doctrine of—Principle; see *Lost grant* 167

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Lunacy—Indian Lunacy Act (Act IV of 1912), Part III, Chapters IV and V—
"Judicial powers over persons and estate of lunatic"—Interim order for custody or management of estate of a person before adjudging him a lunatic, if can be passed—High Court Original Side Rules (Ranjit) Chapter XXX—Provisions re: lunacy, if exhaustive and take away inherent power of High Court—Proceedings in lunacy, if civil proceedings—Code of Civil Procedure (Act V of 1908), section 141, orders 39, 40—Interlocutory orders in lunacy, if can be passed under—High Court as successor to Supreme Court, if has all powers and jurisdiction of Courts of Chancery in matters of welfare of infants and lunatics—High Court, if has inherent powers on matters on which the Lunacy Act is silent.

Though it is true that the sections in Chapters IV and V of Part III of Indian Lunacy Act dealing with "judicial powers over persons and estate of lunatic" do not in terms contemplate or sanction the making of any interim order for the custody or the management of the estate of a person before he is adjudged to be a lunatic, nor is there any provision for the same in Chapter XXX of the High Court Original Side Rules, yet it does not follow that it was intended that the provisions should be exhaustive in the sense that these would take away all inherent powers of a Court of law.

There can be no doubt that proceedings in lunacy are civil proceedings in a Court of Civil Jurisdiction.

Section 141 of the Code of Civil Procedure will apply in proceedings in lunacy and the powers for making interlocutory orders under order 39 and order 40 must necessarily become available to the Court.

The High Court of Calcutta as the successor to the Supreme Court (under Charter of 1774 and Letters Patent of 1862 and 1865) has all the powers, authority and jurisdiction of the Courts of Chancery in all matters concerning the welfare and the care of infants and lunatics and English Courts frequently make interim orders in lunacy proceedings before a person is adjudged lunatic.

The provisions of Indian Lunacy Act in so far as they are expressly contrary to or inconsistent with the powers of the High Court under its Letters Patent must prevail but the High Court has inherent powers

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to act on matters on which the Act is silent. <i>Kalachand Chunder v. Fatehdin</i>	210
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Mens Rea—Indian Companies Act (VII of 1913), section 282—Elements necessary for constituting the offence under—Mens rea, if an essential element—Section 132(1)—Nature and value of assets and liabilities—Appendix, Form F—Secured and unsecured loans, nature of—Loan advanced to company by its director on an agreement to mortgage, if a secured loan—Anomalous character of loan (i.e. whether secured or unsecured) not secured by formal deed of mortgage but entered in Balance sheet as secured—The Director, if can be said to have known the description to be false	
Section 282 of the Indian Companies Act speaks of statement which is false, which is known to be false, which is wilfully made and which is false in any material particular.	
Unless a statute by itself or by necessary implications rules out <i>mens rea</i> as a constituent part of a crime, a person, should not be found guilty of an offence against the criminal law unless he has got a guilty mind.	
The language used by section 282 itself goes to import an element of <i>mens rea</i> when it speaks of the relevant statement being known to be false.	
Section 132(1) of the Indian Companies Act does enjoin that the Balance sheet shall give such particulars as will disclose the general nature of the liabilities and assets and how the value of the fixed assets has been arrived at.	
The form of the Balance sheet is contained in Form F in the Appendix and Item (i) under "secured loans" speaks of loans on mortgage of fixed assets whereas Item (iv) under "unsecured loans" speaks of advances by Directors or Manager and Managing Agents.	
The agreement to mortgage dated 1st January, 1939, gave the mortgagee an option to call for the immediate payment of the entire sum if the company did not obtain the sanction of the Government within the time stipulated, it did not make it binding on him to do so but he could yet insist on the execution of the mortgage. The loan here seems to be of an intermediate variety which could not be properly and correctly	

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Mens Rea—(Contd.) :

described either as a secured loan or an unsecured loan and it was therefore a case in which it was wholly impossible to conform strictly to Form "F" as set out in Companies Act.

Having regard to the somewhat anomalous character of the loan which was not secured by any formal deed of mortgage but which was yet entitled to come to be so secured if the mortgagee insisted on the fulfilment of the agreement, it appears that the director cannot be said to have known the description to be false. **Pulin Chandra Daw v. The Emperor** ... 296

Mortgage decree—Instalment decree—Application for extension of time for payment of instalment—Bengal Money Lenders Act (X B. C. of 1940), section 34 (1) (a) (ii).

Held, when a mortgage decree, payable in instalments, is passed under the provision of section 34(1) (a) (i) of the Bengal Money Lenders Act and when a default has been made in payment of a particular instalment, in view of the first proviso to section 34(1) (a) (ii) the Court has no power to extend the time for payment of the particular instalment but at most the Court can extend the time for payment of the entire amount of the decree, which on such a default in payment of a particular instalment, becomes due at once and the decree-holder becomes immediately entitled to apply for a final decree. But having regard to the provisions of the second proviso to section 34(1) (a) (ii) the judgment-debtor can prevent the passing of the final decree by paying into Court only the instalment in default.

A preliminary decree was passed under order 34 rule 2 of the Code of Civil Procedure read with section 34 (1) (a) (i) and (ii) of the Bengal Money Lenders Act and the principal money together with interest and costs was directed to be paid in 6 annual instalments. The first instalment was to be paid within November, 1941, while the other 5 instalments were payable within November every year for five successive years. The judgment-debtor after paying certain amount out of the first instalment made an application for extension of time to pay the balance. The Court granted the application; the balance of the first instalment was paid within the extended time.

Subsequently, when the time for paying the second instalment was nearing its end, the judgment-debtor applied for extension of time to pay the second instalment. It was stated in the application that he had entered into a contract for sale of the mortgaged property with A and the purchase price would enable the judgment-debtor to pay the entire mortgage money all at once :

Held, that the Court could extend the time for payment of the whole amount.

That an order to the effect that if entire amount was not paid, the second instalment should be held to be in default and the judgment-debtor was not entitled to save one Kist only by payment of Kist, was erroneous. **Debabrata Mukherjee v. Satish Chandra Banerjee** ... 290

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The Karta of a joint Hindu family governed by Mitakshara School of Hindu Law entered into an agreement with his sons, by which a separate money allowance was agreed upon and their messes became separate from their father. As a result of this arrangement, they left the family house. The payment went on for sometime and altogether ceased sometime before the institution of partition suit by one of the sons :

Held, that the son who was defendant, was entitled to claim the arrears of maintenance from the Karta who was also defendant in the partition suit and was entitled to the relief to the extent to which he would be able to prove his claim.

A son begotten as well as born after the partition, where a share has been allotted to the father is not entitled to have the partition re-opened and to claim a re-distribution of the shares. He is only entitled to succeed to his father's share and to his separate or self-acquired property to the exclusion of the divided sons.

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- A son born after the institution of partition suit but before the actual division of the estate cannot claim a separate share in the joint family estate as an "afterborn son". *Bhagwat Ram v. Ramji Ram* ... 302
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- The plaintiff in a suit can only succeed on the strength of his own title and not on the weakness of the title of the defendant.
- Plaintiff's exclusive and peaceful possession for a long time gives rise to an inference of his title against a trespasser and entitles him to a decree for possession against a trespasser but if his possession be merely that of a co-sharer it is quite meaningless to say that he was in possession of a share greater than that to which he is entitled and mere previous possession will not entitle a plaintiff to a decree for recovery of possession except in a suit under section 9 of the Specific Relief Act.
- Though in the summary proceedings under order 21 rules 98, 99 and 101 the enquiry is directed to scope of possession, a suit under order 21 rule 103 is based on the right to possession and not on mere possession at the relevant date.
- A suit under order 21 rule 103 Civil Procedure Code is not akin to a suit under section 9 of the Specific Relief Act and the plaintiffs in a suit under order 21 rule 103 cannot succeed by merely showing that they were in possession and had been dispossessed and they must establish their right to possession on the assumption that they were not in possession on the date of the order under rules 98, 99 and 101.
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—, *suit for—Code of Civil Procedure (Act V of 1908), Order 41 rule 27—Additional evidence, when admissible—Purchase of tenancy by decree-holder in execution of decree passed in rent suit against all but one of the holders—No act of possession exercised—Suit by purchaser for declaration and possession—Review, on discovery of fresh evidence that the alleged left-out holder had no interest, refused by appellate Court—Court, in second appeal, if has jurisdiction to entertain an application for admission of such additional evidence—Decree passed in the said rent suit, if a rent decree.*

Additional evidence could be admitted only when the appellate Court itself required it and the evidence now produced by the plaintiff is clearly evidence of that explanatory character.

On the rejection of the application for review the decree as passed by that Court remained as it was and when that decree came to be dealt with by High Court in second appeal it is impossible to say that an application for admission of additional evidence would not lie as a matter of law, because such an application, made in the form of an application for review, had been rejected by the lower appellate Court and the Court in second appeal has jurisdiction to entertain such application.

On consideration of the additional evidence it must be held that the decree obtained by the plaintiff appellant was a rent decree, *Maharaja Sashi Kanta Achariya Bahadur v. Jagannath Namadas* ...

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Held: That where the entries in the settlement record formed the cause of action of the action in suit and the courts below did not note specifically that the presumption of correctness of the Record of Rights had been rebutted but where there was a specific issue on the question of the correctness and it was definitely found on examination of the evidence of both parties that the entries were not correct, this necessarily implies a finding that the presumption of correctness is rebutted.

Presumption—(Contd.):

Though the recitals in the tenant's Kobala are not binding on the landlord yet the Kobala is admissible in evidence under section 13 of the Evidence Act especially when it covers the land in suit. <i>Maharaj Bahadur Sing v. Barkatulla Gachua</i>	158
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R made a complaint to the Magistrate who after examining him on oath passed the following order: "To O/C Matlaburnj P. S. for enquiry and if necessary to start a case treating the petition as F. L. R." On reference:

Held, that there was some allight confusion in the order given; the Magistrate could either (1) treat it not as complaint but send it to police to treat it as First Information Report and act under chapter 14 of the Code, or (2) examine the complaint and then direct an enquiry under section 202 of the Code by the O. C. who would then proceed with the investigation; in the former case (1), if the officer thinks that there is nothing in the information, the matter would come to the Magistrate as final report or else as a charge sheet if the officer consider that a case had been made out; and in the latter case (2), the report would come before the Magistrate as a report under section 202 of the Criminal Procedure Code to be dealt with under section 203 and other relevant provisions of the Code. **Dr. Robul Hossain Molla v. K. K. Ram**

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<i>Held</i> : That when an order was recorded directing the concise statement to issue, no presumption can be drawn that the ordinary course of business was followed, if it remained untraced.		
That failure to issue this statement is a material irregularity causing injury to the petitioner and the sale is liable to be set aside. <i>Abdul Gafur v. Gura Mla</i>	...	156
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Second Appeal—(Contd.) :

current price while the contention of the other party was that the amount payable was a fixed sum. The question therefore was, what was the alternative amount of rent payable ?

Held, that the real question, on a contention of this kind, was to see not what the strict rights of the parties are under the agreement between them, but what precise question was raised before the Court.

The question which was put in issue (in the previous rent suit) was a question relating to the effect of the lease, that was a question which would be equally applicable to all years, and could not have any special meaning or any special limitations so far as any particular year was concerned. It was the basic question of the tenant's true liability under the lease, in no way dependent on any accidental circumstances of the claim made in the suit ; and the question was raised so directly and the decision is so definite that it operates as *res judicata* in the present suit.

A question as to the amount of rent payable in money in default of the payment in kind being "a question of the amount of rent annually payable by a tenant" a second appeal lies to the High Court.

When the Court below applied itself to the real effect of the alternative provision regarding payment in money and said that the amount mentioned in the lease could not be considered to be the rent of the tenancy :

Held, that this involved a decision as to what was the amount of rent annually payable.

When the Court below held that if payment for a year was not made within the year, the landlord would be entitled to recover only Rs. 33-12 annas as the equivalent of annual rent :

Held further, that the Court below substantially decided a question as to the amount of rent annually payable. **Tarangini Mitra v. Abhilas alias Abinash Mondol** 125

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On the 13th February 1937, the respondent, instituted a suit, being No. 10 of 1937 against the appellant in respect of ornaments, jewelries etc. described in schedule Ka annexed to the plaint. He annexed another schedule, namely, schedule Kha, which consisted of certain items of schedule Ka, in respect of which the lady (appellant) had set up the case of theft. The prayers made were for discovery by the defendant (appellant) of the ornaments etc. and if she failed to do so, for a declaration that those mentioned in schedule Ka were the ornaments etc. dealt with in the award of the arbitrators appointed by the parties to settle the dispute between them, and for keeping them in the custody of the Court or of a receiver to be appointed by the Court. The story of theft was recited in the plaint and characterised as a false one. One of the defences was that the ornaments had been lost by theft. The suit was decreed in the primary Court. The date of cause of action was said to be 19th August 1936 when the plaintiff came to know of the false story of theft.

The defendant (appellant) appealed to High Court against that decree, being R. A. No. 229 of 1938. The judgment was delivered on the 27th November, 1941. The High Court held (a) that Patta Kumari had only a life interest in the ornaments etc. and that Nirmal Kumar (respondent) had a vested remainder therein ; (b) that her (Patta Kumari's) plea of theft was a false one and that she was still in possession of them ; (c) that a life tenant owes a duty to the remainderman to see that the subject is preserved, reasonable wear and tear being excepted ; (d) that if there is a breach of that duty or if it be established that there is a reasonable apprehension on the part of the remainderman that that duty will not be performed by the life tenant he is not entitled to immediate possession but the Court must make suitable orders for the preservation of the property during the life of the life tenant. In the circumstances of the case the order made by the lower Court for the appointment of a receiver was discharged. Some articles were left with the commissioner who was to call upon her to

Suit—(Contd.):

produce the remaining articles before him and who on production was to make a list etc

It was admitted that after the decree of the primary Court passed in Suit No. 10 of 1937, and while Appeal No. 229 of 1938 was pending in the High Court, Nirmal Kumar took steps for causing the jewellery etc. in respect of which the primary Court passed the decree, to be produced by her before the receiver. Patta Kumari, however, filed an application in the High Court in the said Appeal (No. 229 of 1938) supported by an affidavit stating that it would be impossible for her to produce them before the receiver as they were not in her possession but had been stolen.

While the said appeal was pending in the High Court and after the aforesaid application of Patta Kumari had been filed in the High Court, Nirmal Kumar filed on the 28th June 1939 the present suit and prayed for compensation. In paragraph 8 of the plaint he stated that Patta Kumari the defendant, for the purpose of causing loss to him had after the institution of Suit No. 10 of 1937 kept concealed and removed most of the jewellery. Paragraph 9 of the plaint ran as follows:

"That under the abovementioned circumstances and according to law and equity the defendant is liable to the plaintiff for conversion, waste and breach of trust and the plaintiff is entitled to get from the defendant adequate compensation for the same." Two dates were mentioned to be the dates when the cause of action arose, namely the 15th April, 1937, being the date on which the defendant filed his written statement in Suit No. 10 of 1937 and the 16th November, 1938, being the date when she filed her application in the High Court in connection with Appeal No. 229 of 1938:

Held, that the duty which the defendant as life tenant owed, did not make her a trustee for the plaintiff, the remainderman. Hence there was no breach of trust by her in secreting the chattels.

That the defendant appellant could not be charged for waste as that term is understood, for the subject matter was not immovable property. It was a case of permanent injury by the defendant to the plaintiff's vested reversionary rights and as the plaintiff would not be able to find the articles by reason of wrongful act of the defendant, when he would be entitled to have possession.

That a person having a reversionary interest could sue, when by reason of trespass or other illegal act of the defendant, the plaintiff was deprived permanently of the benefit of his reversionary interest:

"The law of England as to trover and conversion is in many senses a very technical law and it is largely put aside now in modern times":

That the act complained of by the plaintiff was "conversion" in this country.

Suit—(Contd.) :

That the suit was not barred under order 2 rule 2 of the Code of Civil Procedure, as the causes of action of two suits, viz. Suit No. 10 of 1937 and the present suit are different.

That as the defendant was not a trustee for the plaintiff and as there was no trust, much less a trust for a specific purpose, section 10 of the Limitation Act was inapplicable.

The present case was either governed by Schedule I, Article 36, providing for 2 years limitation and the date from which limitation ran was the date of malfeasance of the defendant which would be when she refused to produce them before the receiver, and would be within time or under Schedule I Article 49—where the defendant had wrongfully detained the movable properties, in spite of a decree of Court she refused to produce and hand them over to the receiver when asked to do so. That refusal, which was on a false pretext, was on the 16th November, 1938 and so well within 3 years of the present suit :

Article 48 Schedule I of the Limitation Act contemplates suit by plaintiff who has the right to possession, that is to say, when he is entitled to immediate possession. *Sm. Patta Kumari Bibi v. Nirmal Kumar Sinha Nowlakha*

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— *if lies—Rent, suit for—Title—Correctness of Settlement Khatian, if can be questioned for the first time in second appeal—Objection as to non-registration of habullat, if can be taken for the first time in second appeal—Unregistered Kabullat, if admissible in evidence—Bengal Tenancy Act (VIII of 1885), section 29(a).*

When there was no dispute at the time of trial or before the lower appellate Court, that the relationship of landlord and tenant existed between them, that the defendants claimed to be, and the landlord by suing for rent admitted them to be his tenants and the only question was the rate of rent :

Held, that the question of title need not be decided except in so far as it was necessary to do so in order to decide the rate.

The High Court should not, in second appeal, interfere with the conclusion of Courts below as to the correctness of the entry in the Settlement Khatian merely on the ground of misappreciation of evidence.

The presumption of correctness of entry in the Settlement Khatian was rebuttable and the presumption could not be maintained if it appeared that the foundation for the entry was erroneous or non-existent in law.

An objection as to reception of unregistered Kabullat can for the first time be taken in second appeal.

Where an unregistered Kabullat appeared to be a document which created a fresh settlement and the basis of recognition of tenant was the agreement for the payment of the enhanced rent :

Held, that it was inadmissible in evidence.

Suit—(Contd.):

That even if the document that is, the unregistered *Kabuliat*, could be construed as a simple agreement for enhancement of rent, it could not form the basis for enhancement under section 27(a) of the Bengal Tenancy Act, being unregistered.

In this case the suit was for rent for 1342-45 B. S. :

Held, that payment of rent for the years 1336, 1338 and 1340 B.S. would not remedy the defect of unregistration under section 29 a) of the Bengal Tenancy Act. *Sugan Mal Chorari v. Prokash Gobinda Majumdar*

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—, *maintainability of—Suit for dissolution of marriage by minor Mahomedan girl, without next friend—Civil Procedure Code (Act V of 1908), Order 32 Rule 1—Indian Majority Act (IX of 1875), section 2(a).—To act.*

The institution of a suit by a Muslim minor girl, who has attained her puberty, for dissolution of marriage, being an act in the matter of marriage within the meaning of section 2(a) of the Indian Majority Act, without a next friend despite order 32 rule 1 of the Code of Civil Procedure, is valid. *Naksetan Bibi v. Halbar Rahman Mandal*

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—, *maintainability of—Bengal Tenancy Act (VIII of 1885), sections 146A 147(2)—Recovery of arrears of *darpatni* rent—Code of Civil Procedure (Act V of 1908), Order II rule 2—Separate suit for recovery of a portion of claim arising out of same cause of action.*

In 1909 the plaintiff's predecessor sued defendant No. 1 only for recovery of *Darpatni* rents for the year 1342 even though the rents for the years 1343 and 1344 B.S. had already become due. The plaintiff thereafter sued the defendants Nos. 1 and 2 for arrears of *darpatni* rents for the years 1343 and 1344 B.S. and contended that as the tenants were jointly and severally liable and that as the defendant No. 2 was not a party in the previous rent suit, he was entitled to get a decree against the defendant No. 2. The Courts below dismissed the suit on the ground that a decree obtained against one of the joint promisors was a bar to a subsequent suit against others :

Held, that the plaintiff was not entitled to claim rent against defendant No. 1, section 147 (2) of the Bengal Tenancy Act being applicable to a holding and not to a tenure. That the suit against defendant No. 2 was maintainable.

Query : How far the rule of law enunciated in *King v. Heare* is applicable to this country in view of the express provision of section 43 of the Indian Contract Act.

Held, that the rule in *King v. Heare* ; *Kendall v. Hamilton* and *Brinsmead v. Harrison* does not apply in the present case whether the liability of the tenants be held to be joint or joint and several.

Order 2 rule 2 of the Code of Civil Procedure is not based upon the doctrine of merger. It enacts a special rule that if the plaintiff was able to claim a wider and much larger relief than that to which he limited his claim in the suit, and which arises out of the same cause

Suit—(Contd.):

of action he would not be entitled to recover the balance in a subsequent suit. To make the rule applicable, two things are essential: First, that the previous and the present suit must arise out of same cause of action, and, secondly, they must be between the same parties;

Held also, that as the claim for rent for the years 1343 and 1344 B.S. was not the subject matter of the earlier suit at all, the cause of action as against defendant No. 2, so far as this claim is concerned could not be merged in the previous judgment which therefore did not operate as a bar against him.

The plaintiff was barred in bringing the suit against defendant No. 1 under the said Order 2 rule 2 of the Code of Civil Procedure. **Phani Bhusan Mukherjee v. Rajendra Nandan Goswami ...** ...

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—, *maintainability of—Right of way—Obstruction—Public nuisance—Proof of special damage—Obstruction to village pathway—Public highway—Civil Procedure Code (Act V of 1908), section 91 order 1 rule 8—Non-compliance with the provisions of order 1 rule 8 Civil Procedure Code—Civil Procedure Code, order 18 rule 4, effect of non-compliance with.*

If the obstruction complained of relates to a public highway, or in other words, if the suit is for removal of a "public nuisance", the plaintiffs will have to establish special damage in order to avoid the bar of section 91 Civil Procedure Code but in the case of an obstruction to a village pathway no question of special damage can arise. There is a distinction between a public highway and a village path, and a suit is maintainable when a right to a village pathway is the subject-matter of litigation even in the absence of special damage. The question whether a path is a village path or a public highway is a material question of fact to be decided after hearing all available evidence and a summary decision that the way was a public highway and that a suit was not maintainable in absence of any proof of special damages is improper.

An omission to comply with the provisions of order 1 rule 8 Civil Procedure Code which is an enabling section does not stand as a bar to the plaintiffs' suit, if the plaintiffs have a right to relief independently of other persons having the same interest, though a decision in the absence of such persons will not affect their interests if they are not made parties in the suit.

Held further, that the provisions of order 18 rule 4 should not be ignored and the summary disposal of a suit without giving the plaintiff any opportunity of rebutting the objection which was specifically indicated for the first time in the cross-examination of one of the plaintiffs is neither fair nor proper. The Court cannot summarily over-rule the provisions of order 18 rule 4, Civil Procedure Code and refuse to

Suit—(Contd.):

examine witnesses in attendance. Where a suit is being summarily dismissed on the finding that the path in question is a public way and that there is no proof of special damage, both substantial questions of fact, the provisions of order 18 rule 4, Civil Procedure Code cannot be ignored and the order for summary dismissal in such cases is unfair and improper. <i>Hangsa Kalita v. Prodipral Deka</i>	266
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—, sale of— <i>Bengal Tenancy Act (VIII of 1885), sections 65 and 146A, Chapter XIV—Defaulting tenure sold during the pendency of an execution proceeding—Tenure, if passes at the rent execution sale unless the purchaser is made a party to the execution proceedings.</i>	
<i>Held</i> , where a tenure is sold pending the execution of a decree for arrears of rent in respect of the same tenure, the purchaser must be made a party to the execution proceeding in order that rent sale may have the effect of a sale under Chapter XIV of the Bengal Tenancy Act.	
The decision of the Special Bench of this Court in <i>Krishna Pada Chatterjee v. Manada Sundari Ghosh</i> which was based on the pronouncement of the Judicial Committee of the Privy Council in <i>Forbes v. Bahadur Sing</i> is that the right to bring a tenure or holding to sale under section 65 of the Bengal Tenancy Act exists so long as the relationship of landlord and tenant subsists between the parties and consequently if the relationship does not exist at the date of the sale, it would not have the effect of rent sale under Chapter XIV of the Bengal Tenancy Act.	
Section 146A provides that even if some of the co-sharer tenants are left out in a rent suit but still if the defendants to the suit represented the entire body of the co-sharer tenants, the decree would have the effect of a rent decree and the sale would have the same consequence as the sale of a holding or tenure under Chapter XIV of the Bengal Tenancy Act.	
But for any reason other than the non-joinder of all the tenants as parties defendants to the suit, the suit cannot have the effect of a rent decree or the sale a rent sale and section 146A has no application at all. <i>Mensajuddin v. Heronuddin Mullick</i>	363

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As soon as a transfer of a share in a holding is effected a right to pre-empt immediately accrues to the co-sharer tenants, and any subsequent transferee of the property takes it subject to that right. This rule applies whether the subsequent transfer is made before or after the application under section 26F of the Bengal Tenancy Act is made.	
The fact that the subsequent transferee did not know the identity of the person who had the right to pre-empt makes no difference to the rights of the parties.	
In an application under section 26F of the Bengal Tenancy Act by the co-sharer tenant for pre-emption the transferee from the purchaser is a proper party. <i>Sheikh Lokeman Ali v. Abdul Motaleb</i> ...	14
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Section 168A of the Bengal Tenancy Act is *intra vires* the Province of Bengal as it is covered by Entry No. 21, List II as also by Entries Nos. 21 and 2 of List II of Schedule VII of the Constitution Act. It is a valid piece of legislation and forms part of the Bengal Tenancy Act. Thus the Civil Procedure Code can apply only subject to the provisions of the Bengal Tenancy Act and that includes section 168A.

Section 168A of the Bengal Tenancy Act is not in conflict with Entry No. 4 of List III of Schedule VII of the Constitution Act.

Section 168A of the Bengal Tenancy Act is applicable even though the decree be not considered as passed under the Bengal Tenancy Act.

The respondents held a *putni* as tenants under the appellant. The lands under the *putni* were agricultural lands. The rents due in respect of this *putni* were in arrears for many years and on the 15th May, 1936, the *putni* was put up to sale under the provisions of Regulation VIII

Ultra vires—(Contd.):

of 1819 for recovery of the rent due for the last *kist* of 1342 B. S. (1935-36) and was purchased by a stranger. For recovery of the rent due in respect of the years 1339-41 B. S. (1932-35) and the first *kist* of 1342 B. S. (1935-36) the landlord instituted a suit and obtained a decree on 25th February, 1938. The decree-holder applied for recovery of the decretal money by attachment and sale of certain immovable properties belonging to the judgment-debtors other than what was given as a *pawni* to the debtors.

Held, that the appellant was not entitled to proceed against any other properties of the judgment-debtors under section 168A of the Bengal Tenancy Act.

That the decree passed in the present case was a decree for rent. The proviso to section 17 of Regulation VIII of 1819 did not make the arrears of rent a money claim.

The procedure to cause the property let to the tenants to be sold for the immediately preceding year's rent only, is a special procedure provided by Regulation VIII of 1819 and a landlord can take advantage of it without going to Court at all.

That the provisions of the Bengal Tenancy Act applied even after the relation of landlord and tenant had ceased to exist. **Maharajahdhiraj Uday Chand Mahtab of Burdwan v. Minor Samarendra Nath Mitra**

— *Bengal Tenancy Act (VIII of 1885), section 26G(5)—Bengal Agricultural Debtors Act (VII B. C. of 1936), section 36, if inconsistent with former*

Section 36 of the Bengal Agricultural Debtors Act has repealed section 26G of the Bengal Tenancy Act so far as the mortgage is concerned.

An occupancy raiyat who had obtained a settlement of mortgage debt under section 18(2) which was embodied into an award under section 19 from the Debt Settlement Board on his petition under section 26G(5) of the Bengal Tenancy Act, can apply for and obtain a better remedy under Act VI of 1938. **Aptar Ali Talukdar v. Ahammad Ali Molla**

— *Decree of Original Side, High Court, for goods supplied in Calcutta, sent to Benares for execution—United Provinces Encumbered Estates Act (XXV U. P. of 1934)—After sale of immovable properties of judgment-debtor, the District Judge, Benares, sent the decree to Original Side, High Court, for realisation of balance of decretal dues—The decree sent to Howrah Court for execution—Code of Civil Procedure (Act V of 1908), section 47—Objection thereunder—The rights under decree in Original Side, High Court, if absorbed in decree passed by the Special Judge under the provisions of U. P. Encumbered Estates Act and separate existence of the decree of Original Side, High Court, thereafter, if extinguished—The provisions of U. P. Encumbered Estates Act, if ultra vires in affecting the rights of creditors outside that province—Legislature, if can curtail such right to sue or to execute.*

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The provisions of the United Provinces Encumbered Estates Act (XXV U. P. of 1934) with the previous sanction of the Governor-General could only have effect over the United Provinces of Agra and Oudh and would *prima facie* be *ultra vires* if and so far as it affects the rights of the creditors which had originated outside that province.

If however that right is sought to be enforced by a suit in a Court in that province or a decree obtained outside is sought to be executed within the province, the legislature there would have the power to curtail the right to sue or to execute as is done in section 7 of the Act.

The whole scheme of the Act may be summed up to consist of three distinct stages. The first or the initial stage begins when the Collector of the District to whom application is presented examines whether the requirements as set forth in sections 4 and 5 have been complied with and ends with his passing an order for forwarding the application to the Special Judge appointed under section 3 of the Act. In the second stage the Special Judge ascertains the assets and liabilities of the applying landlord after adjudication in such a manner as to make it binding on the creditors. To give finality to his decision, it is treated as a Civil Court decree, subject to appeal and revision, executable under the provisions of the Act. The second stage ends with the Special Judge transmitting his decree to the Collector along with the list of landlord's properties liable to be attached and sold. The third and final stage is one of realisation and distribution of assets.

The inferences are :—

- (a) that this scheme of administration fits in with the Act having only local operation in the strict sense of the term ; that is to say, operation within the United Provinces and not beyond ;
- (b) that a creditor in whose favour the Special Judge has passed a decree cannot himself take out execution of the decree so passed in his favour ; and
- (c) that the intention of the legislature is to save the applicant landlord from harassment by and consequent expenses of suits and executions taken by his creditors, and, as section 7 indicates, within the province.

If only the language of section 18 is simply followed and no other considerations are brought to bear, a decree passed by a competent Court even outside the province in respect of a debt due by the landlord who made the application under section 4 of the said Act would be extinguished, for previously existing rights of the creditor are extinguished, and the right he has under a decree passed before the decree passed by

Ultra vires—(Contd.) :

the Special Judge would fall within the phrase "previously existing right" occurring in that section ; but from the intention of the legislature as gathered from the statute and in view of the fact that the Special Judge cannot have jurisdiction over the claims of all and every one of the creditors to whom notices under section 9 had been issued, it follows that it would involve in some cases assumption by him of jurisdiction of an extra provincial nature which the United Provinces Legislature could not in law confer on him.

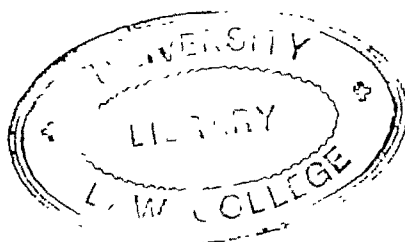
It follows therefore that the Special Judge had no jurisdiction to adjudicate upon the claim of the creditor and so section 18 of the Act and those provisions cannot affect the decree passed by this Court in favour of the creditor, for this Court had power under the Letters Patent to pass that decree and either to execute it itself or have it executed by a transferee Court and the provincial legislature even of this province, much less of another province, could have by legislation affected its jurisdiction at the time when the said decree was passed, for at that time the central legislature was by virtue of clause 44 of the Letters Patent the only legislative authority in India which could have modified the Letters Patent.

The doctrine of submission to jurisdiction is an accepted doctrine in Private International Law but that doctrine is not applicable to domestic Courts, as consent cannot confer jurisdiction to a domestic Court where by law it has none. *Madangopal Bagia v. Lachmias*

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TOPICAL TITBITS.

There is an impression among the public that Law is nothing but Common sense embodied in words. The impression is strengthened by the great presumption of law itself that every one must be presumed to know the law of the land for if Law were not to a great extent common sense, how could such a big presumption be made in the case of law both civil and criminal?

That the impression is wrong goes without saying. Law is such a comprehensive word and is so complicated a matter that no one knowing the denotation and connotation of the word Law would call it common sense from any point of view. There is much of common sense and if we might add common feeling in the law of succession of every country taking the word succession to mean inheritance also. There is much of common sense in the Law of Contract also. But to say that there is very much of common sense in the Indian Company's Act or in the Indian Evidence Act or in the Law of Mortgage of the Transfer of Property Act is certainly to aver too much. There are provisions in all these laws which are highly technical and highly artificial so that a layman would not even follow their meaning unless sufficient explanation is given.

Law in general contains something of common sense but law in particular is so peculiar a product of time, tradition, statutes, decisions, deliberation and customs that to call it common sense would be to miss its real meaning. Sometimes law is so highly artificial that no common sense can unravel its meaning. If we take special laws like the Defence of India Act during the war into consideration, we shall see even from the mere provisions as to punishment how arbitrary law may be. So too if we take into consideration the provisions of the Indian Companies Act as to the circumstances that would make one company subsidiary of another, we shall see that common sense is not paid much attention to.

The truth is that though every human institution of which law is but one must be based on some common ideas permanently

or sometimes even temporarily in vogue and therefore on common sense, Law is hardly composed of common sense even to one fourth of it. The main principle of Law which must have some common sense in it is carried to such labyrinthine courses and made so complex and complicated that the spirit of that very common sense might, after sometime stand up and say unto its own metamorphosed self 'Bless thee bottom, thou art translated'.

It cannot be said that a whole group of humanity has no common sense of its own. Still we see that among nations the personal law as to inheritance and succession is far from being the same or even similar. Thus the personal law of Muslim allows him to marry four wives at the same time, to divorce them with little restriction. It gives property both to sons and daughters. Not so in the case of Englishmen or Hindus in general. So the meaning of the word common sense must be most duly delimited if we are to say even in loose talk that Law is common sense. Again, within India itself we find two laws of inheritance among the Hindus Mitakshara and Dayabhaga and yet they vary at points to a great degree. A little reflection will therefore show that Law is not common sense but is a special social science which can be understood and used only by those who have made a special study of it. The complicated nature of what we call the adjective or procedural law will make the proposition self-evident.

* * * * *

Section 24 of the Indian Companies Act.

Section 24 of the Indian Companies Act is a purging section. It runs as follows :

A certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with and that the Association is a company authorised to be registered and duly registered under this Act.

There are certain statutory requirements which must be complied with before the Registrar grants his certificate. Thus there must be a declaration that the requirements have been complied with made by a responsible person or a director or an advocate and the declaration required is a solemn declaration. There is

also a penalty prescribed by the Act itself for a wrong declaration. Again, there is penalty prescribed for submitting names of directors who have not formally and in writing agreed to act as directors. All these evidently are solemn penal sections going to protect and safeguard the formation of the company at its very inception. Suppose now that a Registrar grants a certificate of Registration to a company or association of persons without any or without all the requirements being fulfilled. Will such registration be declared to be valid by the High Court which alone has jurisdiction in the matter or will the registration be found by it to be invalid and the Association be declared an illegal association by the High Court?

As we have already said section 24 is a purging section and can according to its terms go to the furthest extent of purging anything of the nature of defect in the constitution of a company. The question is how far could the purging effect proceed? Could it go so far as to avoid all the statutory provisions which are made mandatory by the Act itself by the use of the word 'Shall' and are not merely directory? If we are to answer this question from the authoritative decisions of the highest courts of Justice such as those in *Bowman v. Secular Society* (1) 1917 or *the Peals' case* (2) on the relevant section, the answer is in the affirmative. The purging section is allowed to purge every defect. But if we look at the matter from the general principle of interpretation applied to Statutes it must be in the negative. Every word of a statute is sacred and no word can be treated as mere surplusage. How could therefore the mandatory provisions be allowed to be utterly disregarded merely because of the existence of a purging section? The purging in such a situation must be limited to smaller defects. In the words of Law it must be duly delimited and in our opinion the decisions on the point pronounced hitherto must be kept within bounds and must not be of such sweeping nature as they have hitherto been. The section should not be allowed to Act where the Registrar goes to oblige a company for considerations other than fair, when the memorandum which is a contract between the signatories is glaringly defective, when the Articles are nonsensical or when there is no memorandum properly so called to register or when no consent of directors is filed according to the statute and no solemn declaration made by anybody before the certificate of registration is issued. We

(1) [1917] A. C. 406.

(2) 2 Ch. 674; 36 L. J. Ch. 757; 16 L. T. 780.

respectfully draw the attention of the Hon'ble High Court and of the Judicial Committee to this section of the Act till now interpreted by their decisions and suggest to them in the interest of the administration of the Act itself and in deference to some definite provisions embodied as statute by the Indian Company Act to delimit the scope of section 24 in their future pronouncements.

While suggesting this course we do not ignore the evil consequences that would follow if a company once known to have been registered by the people in general is subsequently found out by a court of justice as not to have been duly registered. Between the period of registration and the time when registration is declared invalid many intermediate interests may have come into existence. Our contention is that a company being a creature of the statute must have no defect at its very creation or inception or rather should have as few defects as possible and the mere *ipse dixit* of an officer like the Registrar should not have the force of directly infringing some of the specific provisions of the Statute Law. Moreover if an association is declared illegal the rights and obligations of the company may for a time be in a disorganised condition. But they may still be treated by a court of law as unextinguished and effective as against the existing constituents of the company as also in favour of them where the solid rights of the company are concerned, or the company in such a situation may be declared to be wound up and be put under a liquidator or a receiver.

S. C.

NOTES OF CASES.

Sarapati Devi v Biswanath.

Provincial Small Cause Courts Act, (Act IX of 1887), article 31, applicability of—Jurisdiction of Small Causes Court.

Sarapati Devi and Biswanath were co-sharer landlords. Biswanath sold away the fruits of the garden to some persons and appropriated the entire amount and did not give the plaintiff's share. She instituted a Small Causes Court suit for recovery of her share of the sum together with interest and costs, which was dismissed. On revision :

1945.
I. L. R. 25
Pat. 480.

Held [per *Manohar Lal* and *Imam, JJ.*—] that the suit was not excluded from the cognisance of the Small Causes Court and that article 31, Small Causes Courts Act 1887, did not apply.

Case laws reviewed.

S. C.

Vadlamannati Damodara Rao v. The Official Receiver, Kistna.

Indian Limitation Act (IX of 1908) Art. 182 (5)—'Final Order', meaning of—Execution petition closed for statistical purposes—Not a final order—Subsequent petition, continuation of previous petition.

1945.
I. L. R. [1946]
Mad. 527.

An application filed on 22nd January, 1935, for execution of a decree passed on 21st September, 1932, was "closed" by the District Judge for statistical purposes. Another application for execution filed on 22nd December, 1942, was dismissed by the District Judge as time-barred. On appeal the learned Single Judge remanded the case. On Letters Patent Appeal:

Held [per *Leach C. J.* and *Lakshmana Rao J.*—] that the order "closing" the execution petition for statistical purposes is not a final order within the meaning of article 182(5) of the Indian Limitation Act and that the later application is not regarded as a fresh application but an application to revive or continue the former application.

Sivasubramaniam Chettiar v. Murugesu Mudaliar (1) followed.

S. C.

(1) [1940] 1 M. L. J. 537.

The Province of Madras v. C. A. Galla Kotwala & Co. Ltd.

Sale of Goods Act (III of 1930) section 42—Buyer's failure to intimate within reasonable time rejection of goods—Goods deemed to have been accepted—Buyer liable to pay price of such goods.

1945.
I. L. R. [1946]
Mad. 548.

The Government of Madras sued the company for recovery of the price paid as the fire hose-pipe supplied was of inferior quality. The suit was dismissed as the Government did not exercise the right of inspection and rejection within a reasonable time. On appeal:

Held [per *Leach, C. J.* and *Patanjali Sastri, J.*—that where in pursuance of a contract a person takes delivery of certain goods and fails to exercise his right of inspection and rejection within a reasonable time thereafter, he will be deemed to have accepted the goods within the meaning of section 42 of the Sale of Goods Act and in any event, failure to intimate his rejection of the goods to the seller within a reasonable time will make the buyer liable for the price of these goods.

S. C.

Mahades Gopal Pendse v. Hari Waman Bhate.

Code of Civil Procedure (Act V of 1908) section 115.

1944.
I. L. R. [1945]
Bom. 739.

In a suit the plaintiffs were asked to pay higher court fees whereupon they moved the Hon'ble High Court in Revision where a preliminary objection was urged that such an application was not maintainable.

Held [per *Lokur* and *Weston, JJ.*—that a finding by Court calling upon the plaintiff to pay higher court-fee amounts to a refusal to exercise jurisdiction and that an application against the order would be maintainable under section 115 of the Code.

S. C.

K. P. Dalal v. Rustomji S. Jamadar.

Indian Arbitration Act (X of 1940) sections 2 (c), 21 and 40 and Chap IV—Parties asking the Judge to act as arbitrator—Arbitration Act, if applicable

1944.
I. L. R. [1945]
Bom 744.

In a suit for ejectment the Small Causes Court Judge was asked to arbitrate between the parties and he passed an order dismissing the suit. In revision :

Held [per *Divatia, J.*—that when a Judge is asked to arbitrate between two parties he does not cease to be the Court and become a pure arbitrator. The provisions of Chapter IV of the Arbitration Act 1920 as well as the provisions of Schedule II of the Civil Procedure Code 1908, since repealed, necessarily implied that when a dispute in a pending suit is referred to arbitration, the arbitrator must be the person other than the Judge presiding in the Court, otherwise the provisions of that chapter would not be applicable at all.

S. C.

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NOTES OF CASES.

Sarapati Devi v. Biswanath.

Provincial Small Causes Court Act 1887 (Act IX of 1887), Article 31, applicability.

1946.
25 Pat.
480.

Sarapati Devi's suit for recovery of her share of the price of fruits of the garden, sold and appropriated by her cosharers Biswanath and others, defendants, was dismissed by the Small Causes Court Judge. In revision before the Hon'ble High Court it was referred to Division Bench :

Held [per *Manohar Lal* and *Imam JJ*]—that the suit was not excluded from the cognisance of the Small Causes Court and that article 31 of the Small Causes Court Act 1887 did not apply.

S. C.

Chamroo v. Stephen.

Registration Act 1908 (Act XVI of 1908), section 17(1)(c), applicability—Receipt acknowledging payment of the balance of consideration money, whether requires registration.

1946.
25 Pat.
523.

Chamroo mortgaged a house to Stephen the mortgagee in possession by a registered mortgage bond dated 5th April, 1935, for Rs. 2500 of which Rs. 1000 was paid in cash and the balance was payable in October 1935. Chamroo sued Stephen for a sum of Rs. 745-5-0 being the balance of the rental of the house over the sum of Rs. 1000 already received. The defendant contended that Rs. 1500 the balance was paid on 25th September, 1935, to Chamroo who granted a receipt for it which was not registered. The suit was dismissed by the lower Courts. On second appeal :

Held [per *Fazl Ali, C. J.* and *Ray, J.*]—that unless a receipt by itself acknowledges receipt of payment of consideration as distinguished from payment or receipt of which is due by the time as debt and contains terms amounting to creating, declaring,

assigning, limiting or extinguishing any interest to or in immoveable property of or value of Rs. 100 or upwards it does not require registration and that a receipt which is meant to create evidence of payment of balance of money due on account of consideration is not a receipt acknowledging consideration on account of the creation of an interest in immoveable property within the meaning of section 17(1)(c), Registration Act 1908.

S. C.

Ram Kumar v. Kishore Lal and others.

1945.
[1946]
All. 309.

Partnership Act (IX of 1932), sections 42, 69, 72—Firm—Dissolution of partnership—Partner's right to bring suit—The words, "subject to contract" in section 42 explained.

On the death of one of the partners Musamal, the other partner Ram Kumar instituted a suit against Pandit Kishori Lal on a bond executed by him in favour of the firm Musamal Ram Kumar impleading the widow and the adopted son but not the daughters of Musamal as defendants. The Small Causes Court Judge dismissed the suit under section 69 of the Act holding that it was not barred under section 72 of the Act. In revision :

Held [per *Iqbal Ahmad C. J.* and *Sinha J.*—that the death of a partner need not necessarily cause the dissolution of a firm and the words "subject to a contract between the parties" in section 42 of the Partnership Act do not require that there should be an express contract, that it could be contrary to the well-known canons of construction to give the word "property" one meaning in subclause (b) of sub-section (c) of section 69 and a different meaning to the same word in subclause (a) of sub-section (3) and that there is nothing to prevent the partner of a firm, assuming the old partnership to be dissolved, either himself or with the surviving members of the family of another partner, to realise the property, by bringing a suit on the basis of a bond, executed in favour of a firm.

S. C.

**Mohammad Hasan v. Mohammad Hamid Hasan
and others.**

Code of Civil Procedure (Act V of 1908), Order 41 rule 22—Cross-objection against co-respondent—Extension of period of limitation, whether permissible.

1945.
[1945] All.
317.

Hamid Hasan and one Mehdi Hasan instituted two suits against Mohammad Hasan, the Mutwalli of an wakf estate, claiming certain sums as their respective maintenance and for other reliefs which were decreed in part. On appeal each respondent filed cross-objection claiming relief against the other respondent and the appellant;

Held [per *Allsop* and *Malik, JJ.*—that as a general rule a respondent can file a cross-objection only against an appellant and it is only in exceptional cases where the decree proceeds on a common ground or where the interest of the appellant is inter-mixed with that of the respondent that a respondent is allowed to urge a cross-objection against a co-respondent, that though under order XLI rule 22(3) notice of cross-objection should be given "to the party who may be affected by such objection" it does not imply that the legislature intended that in every case a respondent should have an extended period of limitation for filing a cross-objection against a co-respondent which was in essence an appeal against him and had nothing to do with the appellant.

S. C.

Bathal Bagyalakshmi Ammal v. Thoppai Bapu Aiyar.

Code of Civil Procedure (Act V of 1908), section 47—Conflict between the plaintiff and one of the defendants not in suit and in appeal but in execution proceedings—Appeal under section 47, if lies against the order of Court in those proceedings.

1945.
[1945] Mad.
640.

In a partition suit the present appellant and respondent were supporting each other and there was no conflict of interest between them, right upto the termination of the appeal. Later, in execution proceedings a conflict arose between them. On a question whether the present appellant had a right of appeal under section 47 from a decision of the Court in these proceedings:

Held [per *Wadsworth, A. C. J.* and *Krishna, J.*—that in order that a decision of a question arising in execution between two parties

in a suit should come under section 47 of the Code of Civil Procedure it is necessary that there should have been a conflict in the suit between them and that no appeal lay.

S. C.

Narayanan Nambudripad v Beepathumma.

1946.
[1946] Mad.
665. F. B.

Landlord and tenant—Suit for produce rent—Market value, whether on the date of delivery or of institution of suit.

The point for reference before the Full Bench was:

Whether a landlord suing for recovery of produce rent is entitled to recover its market price ruling on the due date of delivery or on the date of the institution of the suit ;

Held [per Sir Lionel Leach, C. J., Lakshmana Rao and Kunhi Raman JJ]—that where a landlord sues his tenant for recovery of rent payable in kind he is entitled to recover its value according to the market price ruling on the date when the produce should have been delivered to him and not according to the market price ruling on the date of the institution of the suit.

Case laws reviewed.

S. C.

Kallawa Kom Shilingappa Angadi v. Parappa Sankappa Sarvi.

1944.
[1945] Bom.
855.

Transfer of Property Act (IV of 1882), sections 52, 100—Lis pendens—Sale by coparcener of property charged for maintenance of widow under an award decree, if valid.

On the application by Kallawa Shidlingappa, the widow in a joint family a decree was passed in terms of a private award between herself and her husband's two brothers who sold the three properties charged under the decree for maintenance to the father of Parappa Sakappa. On the dismissal of the objections of Parappa Sakappa in the application for execution of the decree, he filed the present suit for declaration and injunction which was dismissed on the ground that his father was not a bonafide purchaser for value but decreed on appeal. On second appeal :

Held [per *Divatia* and *Sen, JJ.*—that an application to file an award in which property is charged for maintenance must be regarded as a plaint for creating a charge over the suit property, that the maintenance decree will come under the explanation in section 52 of the Transfer of Property Act 1882 and that where a money decree creates a charge on immoveable property the judgment-creditor gets a right to bring the charged property to sale in execution proceedings even if the decree does not specifically state that on default by the judgment-debtor the charged property shall be sold and that it is not necessary to file a separate suit for enforcing the charge.

S. C.

**Shadaksharappa bin Mallappa Kabbur v. Karlingawa
Kom Basappa Karadi.**

*Indian Limitation Act (IX of 1908), section 2(10), Schedule I
Article 182 Clause 5—Code of Civil Procedure (Act V of 1908),
Order XXI Rule 63—Plaint in declaratory suit, if step-in-aid of
execution.*

1943.
[1945] Bom.
893.

The first application dated 11th April, 1933 for execution of a decree was dismissed on 20th February, 1936 on the claim by a third party. A suit by the decree-holder thereafter, in the beginning of 1936 under Order XXI Rule 63 of the Code for a declaration that the property was liable to be sold was decreed. His second application for execution on 2nd June, 1939 was held as time-barred by the Courts below holding that the plaint in the suit in 1936 was not an application as a step-in-aid of execution. On second appeal:

Held [per *Divatia* and *Sen, JJ.*—that the word "application" in Article 182 of the Limitation Act 1908 does not include a suit filed under Order XXI Rule 63 of the Code and a plaint in the declaratory suit cannot be regarded as a step-in-aid of execution within the meaning of Article 182 Clause 5 of the Limitation Act.

S. C.

Manranjan v. Rani Brijraj.

*Execution—Code of Civil Procedure 1908 (Act V of 1908) section 52,
scope and applicability of.*

1946.
25 Pat.
550.

Raja of Deo estate took a loan from Manranjan who after the Raja's death sued Rani Biswanath Kumari and Rani Brijraj

Kumari, his senior and junior Ranis and the senior Rani who alone was declared by the Revenue Board to be entitled to possession of the estate, compromised the suit and a decree was passed accordingly, expunging the name of junior Rani from the record. After the senior Rani's death, the decree was executed against the junior Rani and the assets of Deo estate in her hands were sold. The appeal by junior Rani was dismissed. On second appeal :

Held [per *Reuben* and *Ray, JJ.*],—that the decree was against the senior Rani in her personal capacity as the legal representative as enabling the creditor to execute the decree as against the assets of the deceased debtor.

S. C.

Hira v. King-Emperor.

Criminal trial—Conviction for substantive offence, whether can be altered into one for abatement—Code of Criminal Procedure, 1898 (Act V of 1898), sections 236 and 237.

One Hira, a licensee, was convicted for substantive offence under Rule 81(4) Defence of India Rules 1942 on a charge of contravention of clause (5) of the license in this that he did not issue receipt on demand. On revision :

Held [per *Ray, J.*],—that where the facts of the case are such that the principles of sections 236 and 237, Code of Criminal Procedure 1898, may be applicable thereto and if no prejudice is caused to the accused in his defence, a Court of revision can alter a conviction for substantive offence into one for abetment of the offence without a charge for it.

S. C.

Muhammad Hasan v. Mehdi Hasan.

Code of Civil Procedure (Act V of 1908), section 11—Res judicata—Position of co-defendants inter se.

The point for decision was :

Whether a finding between a plaintiff and a defendant can be binding and operative as a res judicata between the co-defendants

1946.
25 Pat.
562.

1945.
[1946] All.
325.

in a suit filed by the plaintiff where the question of the validity of a first will arose not only between the plaintiff and the defendant mutwalli, but it was a point on which all the defendants who were the beneficiaries were interested and they all took up attitudes which were considered most beneficial to them :

Held [per *Allsop* and *Malik*, JJ.]—that a finding between a plaintiff and a defendant need not always be binding and operate as *res judicata* between co-defendants but when the finding is on a point on which all the defendants-beneficiaries took up an attitude beneficial to them, the decision was, more or less, like a decision in a partition suit and operated as *res judicata*.

S. C.

Suraj Bahu v. Messrs. Jaitly & Company.

Companies Act (VII of 1913), section 89—Money borrowed by the Managing Agent of the Company—Whether Company was liable for it.

1945.
[1946] All.
361.

One Joshi Parshottamji lent a big sum on promissory note to P. L. Jaitly, the Karta and manager of P. L. Jaitly & Co., a Hindu joint family firm and managing agents of Lower Ganges Jumna Electric Company. The money was not borrowed specifically on behalf of the company. The suit by the creditor was decreed against the joint family members ; on appeal by creditor's heirs Suraj Bahu and others :

Held [per *Sinha* and *Bennett*, JJ.]—that the company was not liable and the mere fact that the company was benefited was not by itself sufficient to bind the company, that the principle that the members of a Hindu joint family are liable for a promissory note executed by the manager or Karta cannot be extended to the case of a company as there is a special provision in section 89 of the Indian Companies Act.

S. C.

Graham (or Miller) v. Glasgow Corporation.

[House of Lords (Viscount Simon, Lord Thankerton, Lord Macmillan, Lord Simonds and Lord du Parc)]

November 15, December 16, 1946].

Master and servant—Common employment—"Common Work"—Electric trams in collision on highway—Injury to conductress.

1946.
[1947] 1 All.
E. R. (H. L.) 1.

The appellant was a conductress of one of the respondent's electric shuttle tramcars which was about to run up a steep incline

along common rails according to scheduled time when the preceding one ran backwards down the slope due to negligence of the driver to apply the brakes to it and struck the said car and the appellant sustained personal injuries:

Held, that (1) the doctrine of common employment applied, (2) the crew of the two traincars were carrying out a "common work" and (3) the respondent was absolved from any liability by the appellant's contract of employment.

Radcliffe v. Ribble Motor service Ltd. (1) discussed and explained.

S. C.

(1) [1939] All E. R. 637; [1939] A. C. 215.

ASSAM'S NEW GOVERNMENT ADVOCATE.

The Government of Assam have recently made their own arrangement in the High Court for conducting Government Cases Civil and Criminal coming from Assam, by appointing one Senior Government Advocate and two Juniors to assist him. It is not without a precedent as we know Bihar had its own Government Pleader while under the Calcutta High Court.

We congratulate the Government of Assam in their choice. Capt. Satyendra Kisor Ghose, who has been appointed the Senior Government Advocate has a brilliant academic career and has been for a long time a Professor of the University Law College. He has a decent practice, appearing mostly in cases coming from his own Province. He is a member of the Faculty of Law of the Calcutta University and has been connected with various organisations of the University for imparting Military Training to the youths of Bengal.

We offer our congratulations to him and to his Assistants Messrs. Bhabesh Chandra Barua and Sudhir Ranjan Dutt, who are promising Juniors.

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DRAFT HINDU CODE

A COMMENT BY

SRIJUT RISHINDRA NATH SARKAR

The Dominion of India (or the Union of India) should reject the draft Code for the reasons stated below.

For the convenience of the readers and to avoid tiring their patience, I have stated the points in serial order with reference to elaborate discussions in different Appendices attached hereto.

In dealing with this subject, I have avoided references to Hindu Shastras and Hindu religion in support of my views as some Hindus even do not like it, though I myself do.

With these preliminary observations I proceed to deal with the subject.

I. On political grounds this draft Code ought to be shelved as it will not only operate to disintegrate all the Hindus in various ways, but will also weaken them as the members of a nation on account of disruption in each family.

(a) The present Hindu law applies to Hindus all over the world. The Hindu law is the law laid down in the Dharma Shastras and as explained in the various commentaries giving rise to different schools of Hindu law. These are the Codes of Hindu law which are well settled according to the Hindu Law Committee. So the tie of bondage existing between the Hindus of the Dominion of India will be severed with others living all over the world for nothing except for the self-gratification of those who want their names to be associated with the Code.

(b) The law relating to property is diversified than unified. Agricultural lands, property of religious endowments and impartible estates are excluded from the operation of the Code. So different laws of succession will apply to different properties.

(c) The law relating to the Hindu joint family (which can be disrupted by a moment's verbal notice by any member of it) is

changed by the Code which will seriously affect the peculiar useful organisation for which no reasons are assigned. Be it known that in every country there is joint family where the institution of marriage exist. The husband and wife form the unit of a family to which children are gradually incorporated. The question when they are to break up should remain with its members and should not be forced upon them by the Statute. (*Vide* Appendix "A" below).

(d) The law making daughter a co-sharer with the brother is provided in the Code without meeting the objections raised on the point. By this, disintegration of each family is introduced resulting in rather ruin to each. This question is of vital importance and hence elaborately discussed below. (*Vide* Appendix "B" below).

(e) Inter-caste marriage is allowed in Hindu law but instead of giving support to it, the Code has introduced a system of secular marriage by registration (copied from Special Marriage Act) which most of the Hindus would not like for being not as religious marriage with the result that inter-caste marriage will seldom take place. The caste exclusion will thus continue.

Thus disintegration and disruption of the Hindus from the unit family upwards will take place, though the necessary changes wanted by the Hindus might be made without attempting the ambitious scheme of codifying the whole Hindu law.

II. The first Hindu Law Committee (in the second Committee one only of four members in each was merely changed, I. C. S. Chairman being the same) stated: "To-day many of the rules of Hindu law are fairly well-settled" (P. 12 of Report dated 22nd April, 1941); but still they hazarded to draft a Code of whole Hindu law. An act of 5 Sections only (The Hindu Women's Rights to Property Act) being badly drawn the Committee was asked to amend the Act on a consideration of the 6 amending Bills which were introduced for the amendment of the Hindu Women's Rights to Property Act. The Committee expressed their inability to suggest amendment of the Act. It stated "in our view, amendment will mean raising immediately all the controversies latent in the Acts and is, therefore, inadvisable in present circumstances" (para. 35, Report dated 22nd April, 1941). How can they then feel competent to codify the whole Hindu law. As a matter of fact they themselves have failed to draft such a complete Code. (*Vide* Topic after next, IV).

III. The Hindu Law Committee wanted to avoid "the risks of piecemeal legislation", (page 35 of Report dated 22nd April, 1941)

but recommended the preparation, "in *gradual stages* of a *complete Code of Hindu law*" (para 36 of Report dated 22nd April, 1941). But when the Committee was charged to draft a complete Code of Hindu law, it brought out 2 Bills—one on Succession and another on Marriage and suggested to enact them immediately before the other portions of the Code were finished.

We pointed out many defects on some portions only of the Bill on Succession and sent copies thereof to two eminent lawyers then holding high offices in the Government of India at Delhi requesting to treat them for their own use only.

Apart from this comment, the Joint Committee of the two Houses, perhaps, could not understand the "miracle" of avoiding *piecemeal legislation* and introducing enactments *in gradual stages* and also perhaps noticing bad drafting resolved as follows: ".....it may well be found that the present Bill (intestate succession) will require, before it is allowed to come into operation, readjustment and amendment in the light of decisions taken in connection with other branches of the Hindu law". (*Vide* Resolution No. F.—208/1/3 C & G. (Judicial) dated 20th January 1944, New Delhi).

Be it known that the second draft of Intestate Succession is considerably changed. Why? If the second draft be again sent to them for reconsideration it will also be changed in the third, as we entertain that there are still defects in the second draft also.

These are the reasons why in England and in the United States of America this sort of codification is neither approved nor adopted. (*vide*: Appendix "C" below).

IV. Moreover, the draft Code is not only not a complete Code of Hindu law which the Hindu Law Committee at first recommended, but is not itself a self-contained Code of even the portion of the Hindu law contained in the draft. It grafted (without quoting it) some portions of the existing law as part of the draft Code. The codification of a law containing references to old law as part of the new Code is strongly condemned. (*Vide*: Appendix "D" below).

V. The report of the majority of the Committee is not a fair report on which the Government or the legislature can rely to come to a proper conclusion.

(a) The report merely mentions how many persons were examined but no mention is made how many of them opposed the draft Code. It will appear from the dissentient Note of Dr. Dwarka Nath Mitter, M.A., D.L. (one of the four members of the Hindu Law Committee) that 359 were against Codification and 187 were

in favour. It should however be noted that a very large number of Associations is counted as one in 359. If the number of the members of the various Associations *represented before the Committee* is taken into consideration then the per-centage of persons opposing the codification would be about 98% if not more. Some of the Associations contained in the list are: the Hindu Mohasava of whole of India, the Indian Association, the British Indian Association, the Bar Association and the Incorporated Law Society of Calcutta High Court, (no record is made about the Bar Library Club of Calcutta) and various Bar Associations of India. Among the individuals who opposed the Code are: The Hon'ble Justices R. C. Mitter, B. K. Mukherjee, C. C. Biswas, A. N. Sen, N. C. Ayyar, the Maharaja Bhairaj of Darbhanga and Burdwan, the Maharaja of Cossimbazar, Lady Sircar (wife of Sir N. N. Sircar), Lady Mookerjee (widow of Sir Ashutosh Mookerjee), Lady Brahmachari (wife of Sir Upendra Nath Brahmachari), Lady Ranu Mukherjee (wife of Sir B. N. Mukherjee), Maharani of Natore, Pandit Madan Mohan Malaviya, S. N. C. Chatterjee, S. Hiralal Chakravorty, S. Ramaprasad Mukherjee (the last named gentleman was examined by the Select Committee presided over by Sir Sultan Ahmed which terminated in the rejection of the first draft on Succession) and others.

John D. Mayne whose book on Hindu law is of highest authority on questions of Hindu law even now held a view that codification of Hindu law would be a miracle.

Sir N. N. Sircar was in favour of codification provided the majority of Hindus wanted it. A very large majority of the Hindus whose opinion the Hindu Law Committee has recorded, is against the Codification.

Dr. Dwarka Nath Mitter one of the four members of the Committee is against the Codification. His opinion in comparison with his other three colleagues deserves very careful consideration.

S. Shiva Nath Katju, M.A., LL. B., the worthy son of Dr. Kailash Nath Katju led a black flag demonstration when the Committee visited Allahabad. (*Vide*: Report P. 115).

(b) In page 1 of the Report (signed on 21st February, 1947) the majority states: "A rough draft Code was accordingly prepared and circulated early in May, 1944 to a few lawyers, of whom the following were good enough to send their opinions to us". It did not contain the name of one at least whose opinion the Committee sought and who strongly opposed the Codification. The facts relating to it are stated for the readers to make their own inference:

The first sentence of the letter (printed) of the unknown person dated 28th September, 1944 runs thus: "Dear Sir Narsinga Rau with reference to your letter dated 15th May, 1944 forwarding me a copy of your Draft Hindu Code and your reminder dated 1st June, 1944 asking me to send you my suggestions on it, and with reference to the letter of your Secretary dated 7th August, 1944 forwarding me the revised Hindu Code under your direction with a request to communicate my remarks thereon, I beg to send you my observations as follows:—"

Be it noted that the letter was not rejected. The members of the Committee when examined him (not of his own seeking but on invitation) on 1st March, 1945 each of the members had a copy of that letter before him and some questions were put on it.

Without giving him a publicity or notoriety, whatever might be proper, the Committee should have given indications of his objections even without meeting them.

The Law Member and the public are certainly entitled to know what is on the other side of the shield. It will be interesting to know that this Codification was being prepared practically behind the back of the Law Member. (Read the next item).

VI. The whole show of the draft Hindu Code was made by the Home Member an I. C. S. with the help of the Chairman of the Committee another I. C. S. who made the choice of his colleagues. The I. C. S. is depicted by an English writer as "the world's most tenacious trade union" (*Vide*: P. 250 *Discovery of India* by Pandit Jawaharlal Nehru, 1946).

This description clearly fits in from the two reports of the Committee and the draft Codes from which the following points appear:

(a) The Committee wanted to avoid piecemeal legislation but prepared by gradual stages and suggested enactment in parts.

(b) The Committee suggested a complete Code of Hindu law but has produced a part of it only.

(c) They wanted to codify but failed to do so even of the small part drafted as the provisions of the old law has been supplemented in some places without even making them part of the Draft Code in writing, presumably the Committee failed to codify them.

(d) The report it seems carefully avoided making any statement as to whether the majority of the persons whose opinion the Committee considered, support the Code.

(e) The Committee similarly avoided making any reference to the opinion of one whose opinion the Committee sought, his written opinion being against the codification supported by reasons.

(f) Four learned Judges of the Calcutta High Court who not only know Hindu law but are interested to know Hindu law said: "Most of the rules of Hindu Law are now well settled and well understood, and a Code is not, therefore, called for at all." From this the Committee (Dr. Dwarka Nath Mitter, a member of the Committee was not a party to it) drew the following conclusion in the sentence following the above quotation: "But this would appear to be just the reason for codifying the Hindu Law.....". How the one follows from the other surpasses our imagination. It is tantamount to: "Ah, the Judges did not understand what they wrote". (*Vide*: P. 10, Report signed on 21st February, 1947).

... This Draft Hindu Code (the personal law of the Hindus) was made in the teeth of opposition of the Hindus by the I. C. S. the world's most tenacious trade union. Now it is for the Indian Union (Dominion of India) to determine it.

VII. The Draft as made is bad on material points. I reserve this right to comment if and when it is incorporated in the Statute Book.

Be it noted a comment of the Hindu Women's Rights to Property Act XVIII of 1937 (*Vide*: 41 C. W. N. cxxvii) by the writer was followed by the amending Act XI of 1938. A further criticism on the Act as amended (*Vide*: 42 C. W. N. xcix) led to the introduction of 6 Bills which caused the appointment of the Hindu Law Committee to suggest necessary amendments to the Act.

APPENDIX "A"

HINDU JOINT FAMILY.

(To be read with topic I (d) above)

The joint family—is a cherished institution of the Hindus and is the peculiar characteristic of their society of which it is the normal condition. This joint family system is organised on the principle of subordination, and not on that of co-ordination or equality of the members with respect to rank and position. Under it no two persons can be equal, one of them, must be superior and the other inferior relatively to each other.

The Hindus who are accustomed to live in joint family groups are attended and nursed by the members of their family when suffering from disease and the like and so do not require the aid of hospitals. The joint family takes care of its young orphans and its old and infirm members. It looks after and guards and

protects the wives and children of its absent or deceased members. Under this system violence and cruelty to wives and children are impossible, and old age pension is unnecessary.

There is no justification nor reason for abrogating the law on Mitakshara joint family which the Code intends to repeal. The Hindu law-givers introduced the 'socialist' or 'communist' principles in Hindu joint family, a principle now drawing keen attention of a very large population of the globe.

The gains made by one member of a joint family with the help of his special learning obtained with the aid of joint family was deemed (and most reasonably) as belonging to the family; and as a matter of fact the earning of a member of the Indian Civil Service was successfully claimed by the other members of the family. (*Vide* 48 I. A. 162). Thereafter the Hindu Gains of Learning Act, (XXX of 1930) enacting that such property shall be of the acquirer, was passed.

The proposed change on the other hand will seriously affect Mitakshara joint family trade.

In the Dayabhaga School (Bengal School) the sons and their wives were entitled to maintenance from the ancestral property but in the Tagore case it was held that the father has absolute power of disposal over both ancestral and self-acquired property. Great hardship is felt by sons in many cases owing to spendthrift father squandering away whole ancestral property.

The spirit and utility of joint family is not appreciated nor liked by many persons with western culture; many of them do not recognise relation like a brother or sister if he or she is not so fortunate like them. That is the spirit behind the proposed abrogation of Hindu joint family.

United Nations Organisation should function for everlasting global security. Co-operation is needed for national prosperity. Democracy is good. Collective cultivation is beneficial. But curiously enough Hindu joint family is suggested as bad (in this connection read the last two paragraphs of Appendix "B").

APPENDIX "B"

SHOULD SON AND DAUGHTER GET SHARES

(To be read in connection with Topic I (d) above)

In considering the question whether a daughter of a deceased owner in the presence of his son, grandson and great-grandson or

widow should get a share in his estate, the following points require to be carefully considered before we change the law followed more than three thousand years:—

I. *Daughter's Position Under Existing Law*:—This question shall be discussed from the point of view of every nationality where the institution of marriage is in vogue. The authorities of *Srutis*, *Smritis*, *Puranas* and commentaries are avoided in examining this matter, as they are not held in much respect by many Hindus even.

Every man or woman is a member of a family at every stage of his or her life if married, and the smallest unit of such family begin with the husband and wife, their son and daughter are added to it on birth as members. The State in legislating is to look to the best interests of the family including its individual members. It will be a juristic miracle to promulgate law on individualistic interest. Law is necessary to determine rules by which one's action and conduct shall be regulated in his relationship to others. Otherwise, an individual shall be the State and enact his own law and his difference with others will be adjusted by treaties or war. Marriage tie will be settled by treaty and divorce to be effected by war.

The property enjoyed by a family might belong to all, but let us now confine to the property of the husband. In every country where no matriarchal form of family exist, it is the husband who is made liable to maintain them all. The husband dies leaving some property; the existence of the widow is left out of our consideration for the present. The son and daughter begin to enjoy the property of their father.

The daughter is married and demands her share in her father's property from her brother to which the brother answered: "enjoy your husband's property with your children and I shall enjoy the father's property, just like your husband, with my wife and children". If this is followed there will be no disturbance of peace in any family by constant partition of property leading to litigation in either of the family. Partition between brothers discussed later on.

The Hindu law-givers, therefore, judicially made express provision for the daughter (but not for the son) at every stage of her life.

The daughter is entitled to her maintenance befitting her position and status in the family, and similar marriage expenses

out of the deceased father's estate (a). If the brothers separate before her marriage, she is entitled to a quarter share of what a brother is entitled according to Mitakshara school (b), or a provision for proper maintenance and marriage expenses before partition is to be made according to the Dayabhaga school.

After her marriage she is similarly entitled to get maintenance in accordance with the social status and position of her husband and on his death out of his estate (c).

If the father dies without a male issue, the wife having predeceased him, the daughter inherits the estate.

If her husband dies without any male issue, she inherits the whole estate of her deceased husband.

If the husband, governed by the Mitakshara school, was joint and was at all desirous of his wife inheriting his interest in the joint family, he could have easily done so by merely expressing his desire to separate from the joint family in unequivocal terms (d); otherwise the wife is entitled to proper maintenance (e) befitting her social position and the status of the family out of the joint family estate in which her husband had an interest. Be it noted that maintenance charges include residence, establishment, food, clothing, expenses for religious ceremonies and the like, in the style suitable to the position of the claimant and of the family.

If the husband leaves behind him his widow and also sons, the widow is entitled to a share equal to that of her son to the separate estate of her husband under the Mitakshara and in all properties under the Dayabhaga School.

If the husband makes a partition during his lifetime then also the wife is entitled to a share equal to that of her husband and son.

The *mother* and *grandmother* also were entitled to shares when the male descendants made a partition, but these rights have been taken away from these women by this Code and moreover, this Code has made the provision for their maintenance more precarious and to be enforced by a decree of a Court.

(a) Sarkar's Hindu Law, 8th Ed. pp. 124, 279.

(b) Mit. Ch. I, Sec. vii, paras 5-7; Sarkar's Hindu Law, 8th Ed., p. 279; Subbaya v. Ananta, 53 M. 84, 97; 1909 M. 586.

(c) Sarkar's Hindu Law 8th Ed. p. 132.

(d) Appovier's case, 12 M. I. A. 75; Balkishen v. Ramnarain, 30 I. A. 139.

(e) Sarkar's Hindu Law 8th Ed., pp. 278-79; Hindu Women's Rights to Property Act, section 3, (2) which has not been repealed by this Hindu Code *Vide* section 23 and the Schedule.

Besides the above rights a woman might possess her own property known as the *Stridhana* property; and each Hindu woman possesses such property, apart from immovable property, if any, namely, her ornaments the value of which is not insignificant compared with the status of the family.

No one is supposed to take greater interest in the daughter than her father regarding the daughter's rights in his estate. Where then is the necessity for the present provision in this Code when the father if he so chooses can make ample provision for her by his Will? It can be asserted with certainty that not even a rich and educated Hindu with advanced views has ever devised an equal share to his daughter and son unless under a very exceptional circumstance. This is the best index for determining the views of the Hindus.

Therefore, the position of a daughter is perfectly secure under the existing Hindu law.

II. Code Will Cause Ruin To Son And Daughter.—Now let us consider the result that will follow if the daughter is given a share along with her brother in her father's estate as given in this Code.

By marriage, under the existing law, the daughter loses her status in and goes out of her father's family. She will then naturally demand her share, if she becomes so entitled, under the proposed law. The inevitable result will be the disruption of the joint family, the normal condition of Hindu society. We are leaving out of consideration the position of the minor daughters, where there are more daughters than one, when a partition takes place at the instance of the eldest daughter after her marriage.

While she is busy in realising her share from her brother, her husband's sister, like herself, perhaps at the same time, is trying to get hers out of her husband's father's estate. The result will be that her husband's property will similarly be reduced almost to the same extent, as she has carved out of her father's estate in possession of the brother. The husband's estate being reduced, her source of maintenance and consequently that of her family will be reduced. If she inherits the husband's estate she will get less perhaps, by the same extent which she has obtained out of her father's estate. And if she becomes entitled to a share in her husband's estate, she will get a reduced share by perhaps, the same proportion as she may get from her brothers.

Therefore, the total quantity of property available to the husband and wife in both these families practically remains the

same, and the only change effected will be that a stranger, that is, sister's husband or sister's vendee, will be thrust in as a co-sharer in both her brother's and husband's families, to the great inconvenience of both, as will appear from what is more fully explained below.

In the majority of cases the actual shares of the hut and the land that a daughter may get under the proposed Code will be of no such advantage to her, as the marriage of the daughter usually takes place with a bridegroom of a different place, where she is bound to reside with her husband. But if she actually comes to live in her father's house with her husband, a stranger, which is not likely, it will bring untold misery to both the families. She will, therefore, have to sell her undivided share for which she will seldom find a purchaser, as similar process of partition and proposal for sale will be constantly occurring in every Hindu family after the marriage of each daughter, under this new law as proposed in the Code. Even if she gets a purchaser, he will not offer proper price, at any rate, of the portion of the dwelling house, as he will not be able to enter into immediate possession under section 44 of the Transfer of Property Act until a partition is effected by a protracted litigation entailing heavy costs. Therefore, constant ill-feeling, crop of litigations and deterioration in value of property, will be the result and will thus bring about ruin to every family.

The brothers remain joint for sometime after the death of the father so long as their mother is alive and they generally continue to remain so until their sons do not attain the age of discretion when the members generally fall out.

Partition between brothers cannot bring about a similar situation as between brothers and sisters, because in majority of cases they may, and generally, separate in mess but live, as before, in their respective rooms, or, if possible, get it partitioned by metes and bounds and enjoy their allotted portions without much risk of their privacy being violated as they belonged to the same family. Their customs, habits, and manners of living being the same, they live in peace and amity, a condition not possible among strangers, whereas, the daughter who is bound to live in her husband's family under both modern and archaic laws must, in the generality of cases, sell her portion of undivided or divided share in her father's property to a stranger, as her brother may seldom be in a solvent position to purchase her share or to exercise his right of pre-emption with respect to the dwelling house under the Partition Act (Act IV of 1893).

The brother's sons and daughters will, likewise, have to pass through the same procedure, i. e. constant partition and sale of daughter's shares will be going on unnecessarily in each Hindu family and at every step of devolution of heritage.

In order to counteract the effect of the law, the Hindus governed by the Dayabhaga School will perhaps have to devise their property by Will and those governed by the Mitakshara School will have to sever themselves from the joint family before they can similarly execute a legally effective Will. This means a partition suit or a probate proceeding at every step of devolution.

There may be some who believe that the position of the daughter will be, to a certain extent, improved as she will have her separate property and her husband shall not be able to deal with such a share at his pleasure and she may keep her property separately for her own use.

But that position she will seldom be able to maintain. A Hindu wife even if her share be immovable property and not liquid cash to which however, in large majority of cases, her share in her father's estate will ultimately be converted,—willingly allows her husband to dispose of her properties—immovables and movables—including even ornaments when her husband is in pressing need. It may be urged that women are generally forced or prevailed upon to part with their properties. But this difficulty will not be solved if women get shares of their patrimony under this Code. They may similarly be forced or prevailed upon to submit to their husband's wishes and to part with these shares also. Even properly educated, intelligent and strong-minded wives of almost every nationality will do so out of their true and not cupboard love for their husbands to save them from ignominy and trouble. The Hindu wife, on the other hand, cannot dream of keeping anything to herself when her husband is in dire need of money to meet a pressing necessity.

But in the case of the husband the question of using his property exclusively to himself does not arise; because the old Hindu law which has not been changed, and section 488 of the Criminal Procedure Code which is still extant, impose on the husband the liability of maintaining the wife and their minor children.

III. *Where is the equity.*—In this Code whereby the husband's inherited estate is forcibly reduced in providing shares to his sister or sisters and at the same time the poor husband is pinned down to the liabilities under the archaic and modern rules of law to maintain his wife and their minor children without rateable reduc-

tion of this burden, at any rate, by the amount of share he had to part with for his sister or sisters? If the woman wants any share let her have it with the burden attached to the property and relieve the husband's liability for her and of her children's maintenance by a proportionate amount.

IV. *How son and daughter given equal status.*—The following statement will demonstrate that equal status cannot be adjusted in a better way than that given in the old Hindu law.

A daughter gets a share and that is represented by the letter "X". Her husband makes a partition of his estate and he gets a share "Y", his son gets a share "Y" and his wife (the aforesaid daughter) gets a share "Y". Therefore the daughter gets a share "X" plus "Y". If the husband dies she gets "X" plus "Y", "Y" represents a share equal to that of her son in her husband's family.

So long there is no partition of her husband's estate either in his lifetime or after his death—she and her children are entitled to maintenance from her husband or out of the estate after his death as the case may be.

V. *Law during Mohammadan rule.*—The Smritis, and their various commentaries (most of the commentaries came into existence during the Mohammadan rule), did not ever contemplate of a provision for a share being given to a daughter. The daughter along with her brothers got a share in the father's estate according to the Mohammadan law, and, therefore, it cannot be said that the Hindu commentators of this period were ignorant or unmindful of the daughter's cause. Nor did the Rulers of that period ever take any step to remedy the so-called injustice done to the daughters by the Hindu law-givers.

VI. *Views of great men.*—In the reasons stated above in support of the existing Hindu law on daughter's rights in her father's estate, no reference has been made of distinguished persons and hence some reference is given here.

Balam Bhatta, fictitious name of *Lakshmi Debi*, the reputed lady commentator of the *Mitakshara*, did not even think that the daughter was inequitably treated in Hindu law.

Neither Dr. *Troylaksha Nath Mitra*, the Tagore Law Professor on "Hindu widows", nor Mr. *Rajkumar Sarbadhikary* the Tagore Law Professor on "Hindu Law of Inheritance", nor Sir *Goorudas Banerjee*, the Tagore Law Professor on "Hindu Law of Marriage and Stridhan", nor Dr. *Dwarka Nath Mitter*, a member of the Hindu Law Committee, the author of the thesis on the "Position of

Hindu Women in Hindu Law", did ever express any view that the Hindu law of succession regarding the daughter requires any change as proposed in this Code. Nor did Mr. John D. Mayne or Shastri Golap Chandra Sarkar, both distinguished writers on Hindu law, ever feel that the position of daughter required any revision of the law as laid down by the Hindu Commentators.

APPENDIX "C"

CODIFICATION OF EXISTING LAW.

(To be read with Topic III above).

At the outset it must be emphatically stated that there is no necessity of codification of Hindu law apart from other considerations or in other words, there is no necessity of re-writing the branches of Hindu law which are well-settled.

Mr. John D. Mayne whose name is still a byword to the Courts and lawyers, regarding his exposition of Hindu Law, has said, which the Committee has quoted: "The age of miracles has passed, and I hardly expect to see a Code of Hindu Law which shall satisfy the trader and the agriculturist, the Punjabi, and the Bengali, the Pandits of Benares and Rameswaram of Amritsar and of Poona. But I can easily imagine a very beautiful and spacious Code, which should produce much more dissatisfaction and expense than the law as at present administered" (t).

As an editor of the last four editions, (Fifth to Eighth) of Sastri Golap Chandra Sarkar's Hindu Law, this commentator endorses every word of Mr. Mayne quoted above.

Sir Dinshaw F. Mulla in the preface to the sixth edition of his Hindu Law stated (also quoted by the Committee): "These and other matters on which there is still a conflict of authority indicate the necessity of codifying the Hindu Law, if the Hindu community is anxious to save enormous sums of money wasted in litigation in the process of crystallizing the Hindu Law." He, however, did not say anything about such codification in his seventh edition or the last edition which he published.

One may respectfully differ from Sir Dinshaw's reasoning urged

(t) p. 12 of the Report.

in support of his view for codification of Hindu Law, (if the view could be said to have not been subsequently changed by him), and point out that if codification minimises litigation then each edition of Sir Dinshaw's valuable commentary on the fourth codification in 1908 of the Code of Civil Procedure drafted in the lines of the Supreme Court Rules of England, would not have enormously increased in volume each time by additions of new case-laws and amendments after amendments of that Code.

Codification is necessary where the law is unsettled. According to the Hindu Law Committee, many of the rules of Hindu Law are fairly well-settled; (u) and one can boldly assert that the whole of the Hindu Law is well-settled as any other codified law of any civilized country. The various schools of Hindu Law possess written texts as their authorities and they have been explained in many instances by decisions of the highest tribunals. One can say without fear of contradiction that every new enactment will be the subject of new interpretations and will unsettle the well-settled law and will be a fruitful source of litigation instead of minimising them.

Sir John Salmond's Jurisprudence, which has undoubtedly an international repute says: "that the value of codification is no longer esteemed as highly when Sir John Salmond wrote. Codes like all express enactments require interpretation and the cycle recommences (v).

"In recent years the estimate of superior value of legislation in the sense of the direct declaration of new principles has declined. All nations with codes have found much "interpretations" (w). "The American Restatement may be regarded as an attempt to achieve the same purpose" (codification) "by means of a generally accepted Digest owing to the complexities of the American Constitution making a code impossible, which is probably a more scientific method" (x).

In the 10th Edition (1947) of this book the above writing is modified, but nothing is said definitely against it.

Sir Courtenay P. Ilbert's contribution on Codification in the Encyclopedia of the Laws of England (y) is worth reading. It would appear that in England inspite of the suggestion of such an

(u) p. 12 of the Report.

(v) Jurisprudence, 9th Ed. (1937) p. 212.

(w) Jurisprudence, 9th Ed. (1937) p. 212.

(x) *Ibid* p. 219, Note 148.

(y) Vol. III. pp. 125-130.

eminent man like Bentham in support of codification it was not adopted as there were equally strong contrary opinions.

Lord Westbury the then Lord Chancellor attempted in 1866 to have merely a digest exhibiting in a compendious and accessible form the law as embodied in judicial decisions, but the draft being unsatisfactory, it was abandoned.

Sir James Fitz James Stephen similarly failed in his attempt to codify the law of evidence and criminal law and procedure in England, though he had gained experience of codifying such laws in India.

"In British India administrative exigencies led to the enactment of codes suitable to, and sufficient for, the requirements of the situation. For African protectorates and other places under consular jurisdiction similar exigencies have been met by some rudimentary codes framed under the authority of Foreign Jurisdiction Acts."

"On the continent of Europe the requisite motive power for codification has been supplied by the strong impulses which have made for national unity, and by the political inconveniences arising from the co-existence of different system of law in a country under same political governments" (x).

In England Bentham failed. Twelve very eminent men like Lords Cranworth, Westbury, Cairns and nine others appointed by Lord Westbury, also failed even to draft a satisfactory Digest. Sir James Fitz James Stephen also failed, his draft Code on evidence did not advance beyond the first reading. Let us see what happens here.

We cannot speculate whether exigencies exist for the proposed Hindu Code just as those existed before in India indicated in the above quotation (a).

The Tagore Law Professor for 1912 of the Calcutta University on "Codification in British India", was against codification of the Hindu law at the time when he delivered his learned lectures, but was in favour of codifying the Hindu law in future when the country might undergo disintegration of the joint family system (b). One may, however, differ from his *ipse dixit*, namely, "individualistic legislation there must be; its rejection will only make matters worse and will lead to social revolution and anarchy."

(x) *Encyclopedia of the Laws of England* Vol. III, page 129.

(a) *Ibid.*

(b) T. L. L. on Codification (1912) P. 399.

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NOTES OF CASES.

Ramabal v. Anant Daji.

Code of Civil Procedure (Act V of 1908) section 54, Order XX rule 18(1)—Application for execution to send decree to collector for partition—Indian Limitation Act (IX of 1908), articles 181, 182.

1944.
[1945] Bom.
799 F. B.

After preliminary decree on 13th January, 1928, a final decree was passed on 29th July, 1930, and confirmed by High Court after slight variation on 10th November, 1936. The plaintiff filed a darkhast on 4th March, 1939, for partition and recovery of lands in his own share which was opposed by defendant as time-barred. The executing court overruled defendant's objection. On appeal by defendant :

Held [per *Lohar, Weston and Rajadhaksha JJ.*]—that an application to send a decree to the collector for effecting partition being only a request to the Court to do a ministerial act, was not governed by Article 182 of the Limitation Act and that such an application was not governed by Article 181.

S. C.

Appavu v. Manikkam Pillai.

Hindu Law—Partition—Divided status not inferred merely from division of some of the joint family properties—Inference depending on terms of document and subsequent conduct of parties.

1945.
[1946] Mad.
557.

Of the three brothers Kasturi, Sevanathan and Appavu, Kasturi died on 6th October, 1925, and Sevanathan on 19th May, 1930. Kasturi's son Manikkam the plaintiff claimed half share on the ground that the family was joint. The defendants

Appavu, his three sons and widow of Sevanathan claimed that the agreement of 30th September, 1925, between members of joint family effected a division of status and a partition of the family estate and in fact the three brothers were living separate. The Subjudge held that the agreement dated 30th September, 1925, resulted in division of status and partition of property but made the defendants liable for certain sums. On appeal :

Held [per *Lionel Leach C. J.* and *Rajamannar J.*]—that the fact that the members of a Hindu Joint family agreed to and did divide amongst themselves some of the family assets, such as income from agricultural lands, outstandings and other moveable property, does not in itself mean a division in status and that it is not their statements but their relations with the estate that must be taken into consideration in determining the issue.

S. C.

In re Gangavva.

1945.
[1946] Mad.
593.

Indian Evidence Act (I of 1872) section 30—Scope—Charge of murder against three accused—Confession by third accused of offence under section 201 of the Indian Penal Code, if admissible against other accused on charge under section 302, Indian Penal Code.

Where three persons were charged with the offence of murder under section 302 of the Indian Penal Code, and the third accused made a statement that he buried the knife, with which the other two accused committed the offence in order to conceal the evidence of murder :

Held [per *Hornbill* and *Bell, JJ.*]—that the statement amounted to a confession of an offence punishable under section 201 of the Indian Penal Code but that the confession could not be taken into account against the other two accused with regard to the charge under section 302 of the Indian Penal Code.

S. C.

Chowdhary and another v. Gillot and others.

[King's Bench Division (Streatfield, J.), October 14, 15, 16, 1947.]

Master and servant—Loan of servant—Owner left car with the manufacturer company for repair—Employee of company instructed to drive the owner in his car to the railway station—Accident due to negligence of driver—Liability of company, if any.

1947.
[1947] 2 All.
E. R. (K. B. D.)
541.

Dr. Chowdhary made over his Daimler car to Daimler works for repair and at his request for a lift to railway station was driven in that car by a driver of the Daimler Co., who collided with a lorry and injured the doctor.

Held, (1) that since the driver was lent to the plaintiff to drive his own car the onus was on the plaintiff to show that he had abandoned control of the car, and (2) that since the company were in possession of the car as bailees and since the company lent the services of their servant and not the servant himself to the plaintiff, they were liable for damages to the plaintiffs for the negligence of their servant.

Samson v. Aitchison (1), *Century Insurance Co. Ltd. v. Northern Ireland Road Transport Board* (2) and *Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool) Ltd.*, (3) applied.

S. C.

(1) [1912] A. C. 844.

(2) [1942] 1 All. E. R. 491, 496.

(3) [1946] 2 All. E. R. 345, 348.

Re Avaré. Hook and another v. Parkar and another.

[Chancery Division (Roxburgh, J.)—October 14, 15, 1947.]

Wills—Condition—Right of pre-emption—Option to purchase freehold property to be exercised within 3 months after death of testatrix's sister—Time of performance is the essence.

1947.
[1947] 2 All.
E. R. (Ch. D.) 548.

The testatrix directed her trustees to convey certain freehold property to Mr. Cornwall on receipt of written notice from him "within 3 calendar months after her sister Sabina Avaré's death" and of payment by him of the purchase price of £500. Mr.

Cornwall predeceased Sabina and the personal representative of Mr. Cornwall exercised the option on date more than 3 months after her death.

Held, that the option could be exercised by the personal representative but was not validly exercised as it was not within time.

Brooks v. Garrod (1) followed. *Re. Goldsmith's will Trusts, Brett v. Bingham* (2) not followed.

S. C.

(1) (1857) 2 D. G. & J. 62.

(2) (1947) 1 All. E. R. 451.

Hughes v. Lancaster Steam Coal Collieries, Ltd.

[Court of Appeal (Tucker, Somervell and Evershed, L. JJ.)

July 21, 1947.]

1947.

[1947] 2 All.
E. R. (C. A.) 556.

Workmen's compensation—"Accident"—*Incapacity due to hernia—Aggravation by use of pneumatic drill—Medical operation.*

Hughes, an underground borer in a coalmine under the Collieries Company, developed inguinal hernia as a result of using the pneumatic drill, had to be operated upon and was away from work for about 3 months. His application for compensation was dismissed. On appeal:

Held, (1) that the workman had discharged the onus of showing that the incapacity suffered by him was a personal injury by accident arising out of and in the course of his employment and (2) that he was entitled to compensation.

Fitzsimons v. Ford Motor Co. Ltd. (Aero Engines) (1), *Fife Coal Co. Ltd. v. Young* (2) and *Oates v. Fitzwilliam's (Earl) Collieries Co.* (3) applied.

S. C.

(1) [1946] 1 All. E. R. 429.

(2) [1946] 2 All. E. R. 85.

(3) [1939] 2 All. E. R. 498.

Brannan v. Peek.

[King's Bench Division (Lord Goddard, C. J., Humphreys and Singleton JJ.) October 23, 1947.]

Gaming and Wagering—Betting—"Public Place"—Bets taken in public house—Police—Conduct.

1947.

[1947] 2 All. E. R.
(K. B. D.) 572.

Allen, a police constable in plain clothes, while in the premises licensed for selling drinks styled "Chesterfield Arms" in Derby found one Brannan receiving bets from others and he induced Brannan to receive bets from him also. On an information by Peek, a police Inspector, Brannan was convicted. On appeal:

Held, that licensed premises which are not common inns do not constitute "public place" within Street Betting Act, 1906, section 1 (4) because there is no right of entry into such premises and so an information charging the defendant with frequenting such premises for receiving bets is bad in law.

Obiter: It is wholly wrong for police officers or any other persons to be sent to commit offences themselves for the purpose of getting evidence against someone; if they do commit offences, they ought to be convicted and punished as the order of their superior officers would afford no defence.

S. C.

Farrugia v. Great Western Railway Co.

[Court of Appeal (Lord Greene, M. R. Somervell, L. J. and Singleton, J.) October 27, 28, 1947.]

Negligence—Highways—Lorry laden with a large box—Boy running behind the lorry injured by fall of box—Extent of duty of care for user of highway.

1947.

[1947] 2 All.
E. R. (C. A.) 565.

A boy trespassed into a running lorry loaded with a large box, got down when detected but ran on the highway after it to steal a second ride when just below a low bridge the box toppled over and injured the boy. In an action by the plaintiff the defendants were held liable. On appeal:

Held, that even assuming that the plaintiff's ultimate object of the use of the highway was to commit trespass, the use by him of the highway was not a trespass and the defendants were not discharged from their duty of care to him, and (2) that the defendants and their driver having created a potential source of danger owed a duty of care to anyone on the highway in their neighbourhood whether he was there lawfully or unlawfully.

Hay (or Bourhill) v. Young (1) distinguished.

S. C.

(1) [1942] 2 All. E. R. 396.

Sardar Singh v. Chakrapani Acharya.

1947.
[1946] All. 398.

Indian Succession Act (XXXIX of 1925), sections 2 (c), 222, 263, 276—Will—Revocation of grant of probate—"Just cause"—Constructive executor.

One Mst. Sumitra Devi died bequeathing her entire estate for religion and charitable works to her Guru, Chakrapani, who was first charged to pay the legacy of Rs. 500 to her daughter. Chakrapani's application under section 276 for grant of probate to him as sole executor was granted. Thereafter Sardar Singh, the son of the husband's brother of the testatrix applied for revocation of the grant of probate and for grant of letters of administration to him which was dismissed. On appeal:

Held [per *Braund* and *Walimullah JJ.*].—that the statement made by a person applying for grant of probate whether wilfully untrue or not, did constitute a case coming within section 263 explanation (c), that the grant being obtained on a statement of fact essential for the same an application under section 263 to have the grant revoked could be made and that the applicant was neither named by the testatrix as executor nor can he be held to be the constructive executor.

S. C.

Sunder v. Kandhalya Lal and another.*Suits Valuation Act (VII of 1887), section 11—When applicable.*

1945.

[1945] All. 451.

Mst. Sunder instituted a suit valued at Rs. 2000 in the Munsiff's Court having jurisdiction upto that sum, which was contested on the ground of higher valuation. Thereafter she amended the plaint and valued the suit at Rs. 2100 adding Rs. 100 the valuation of the added prayer for injunction. The Munsiff tried the suit. On appeal the objection regarding jurisdiction was upheld and the case remanded. On second appeal :

Held [per *Allsop* and *Malik JJ.*—that section 11 of the Act applies to cases where there has been an over-valuation or under-valuation of a suit and not to cases where the suit has been properly valued but the plaint is presented in a Court without jurisdiction.

S. C.

Nainital Hotel Co. v. Municipal Board, Nainital.*Limitation Act (IX of 1908), articles 52, 56—Electric energy, if "goods".*

1946.

[1946] All. 476.

The Municipal Board sued the Hotel Co. for Rs. 6,979-1-0 for electric energy supplied between 1st September, 1936, and the 7th June, 1941, during which period wrong bills were submitted due to mistake in metre reading. The civil Judge held that article 96 applied and decreed the suit for the whole claim with costs and future interest at 6 p. c. On appeal :

Held [per *Wattullah* and *Bennett JJ.*—that article 52 and not article 96 was applicable, that electric energy was "moveable property" and therefore "goods" within the meaning of article 52 and that the decree should be confined to a period of three years prior to the institution of the suit.

S. C.

Manilal Bhaichand v. Mohonlal Maganlal.

1945.
[1945] Bom. 899.

Code of Civil Procedure (Act V of 1908), section 60(1) as amended by (Act IX of 1937) and (Act V of 1943)—Suit instituted before June 1, 1937—Execution proceedings—Salary and dearness allowance not exempt from attachment.

Manilal Bhaichand got a money decree against Mohonlal Maganlal on August 31, 1937. His application for execution for attachment of the judgment-debtor's salary of Rs. 105 including dearness and other allowances, was allowed in part, disallowing the allowances and deducting Rs. 40 from the salary but was dismissed in appeal. On second appeal:

Held [per Lokur and Weston JJ.]—that in proceedings arising out of any suit instituted before June 1, 1937, the liability of a judgment-debtor's salary to attachment is governed by section 60 of the Code, as it stood before it was amended by Act IX of 1937 and hence the whole of the salary of a private employee including the dearness allowance is liable to attachment.

S. C.

D. V. Arurkar v. The Commissioner of Incometax, Bombay.

1945
[1945] Bom. 913.

Indian Income-tax Act (XI of 1922) section 4(3)(i)—Trust primarily for education and awarding of scholarships to members of the Arurkar family, if for public benefit and for "charitable purpose".

The assessee and others, members of the Arurkar family, created a trust of 3½ % Government of India securities and provided that the annual income should be utilised for education of deserving young men and women of Arurkar family and if there were any surplus it would be spent for granting scholarships to members of Saraswat Community.

Held [per Stone C. J. and Kania J.]—that the trust though educational in character was limited to the benefit of the members of a particular family primarily and not of a fairly large number of the public and so did not fall within the definition of "charitable purpose" in section 4(3)(i) of the Act.

S. C.

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THE ORISSA PROVINCIAL LAWYERS' CONFERENCE.*

Mr. President and Members of the Orissa Bar :

I am most grateful to you for your kindly inviting me to inaugurate your Conference. I passed the Allahabad High Court Vakils' Examination 41 years ago almost to a day and had I continued to practise, without any vicissitudes in my career, I would have now completed just 40 years of very active practice at the Bar. For such an old sinner it is good to be once again in the midst of my own brothers in the profession. The comradeship of the Bar is one of the strangest phenomena in the world. I don't think such fine fellowship and *esprit de corps* exists in any other profession. Members of the Bar spend their life seemingly in perpetual contention and rivalry, but the mutual regard and esteem and genuine affection which they entertain for each other is really one of the most beautiful things in the world. Other people find it hard to believe it. Of a fellow-member who by dint of merit and ability achieves success and fame, everyone in the profession feels proud indeed. The brotherhood of the Bar is not circumscribed by any parochial considerations or geographical limits. It transcends all barriers of race and country and language. It is a fraternity which rightfully claims to be almost all-pervasive and everywhere true to its traditions it endeavours to promote the administration of justice between man and man without fear or favour, with the utmost impartiality, unaffected by any ulterior considerations. This is why I am happy to be here this morning with you, and I propose to speak this morning, not as Governor of your great Province, but as one of you if you would allow me to do so.

* Speech delivered by His Excellency Dr. Kailas Nath Katju, M. A., LL. D., D. Litt., Governor of Orissa, while inaugurating the Orissa Provincial Lawyers' Conference at the Nari Sangha Sadan, Cuttack, on Saturday the 27th March

We are just emerging from the deep gloom cast by the greatest tragedy in our country's recorded history. To few it is given to witness the fruition of their labours in their own life time. Mahatma Gandhi was one of those rare personalities who have seen the cause, for which they had struggled and worked all their life, prosper. He planted the seed of freedom in the Indian soil and saw it germinate and grow and develop into a mighty tree and blossom and bear fruit. But the flowers were as usual coupled with thorns, and Gandhiji was now engaged in plucking out these thorns so that we might reach the fruit without difficulty and he lost his life in this endeavour. Sad and grievous it is to contemplate that it is the very spirit of lawlessness which you and I are engaged day in and day out to curb that led to the violent end of such a precious life. This is neither the place nor the occasion for me to dwell upon the marvellous life Gandhiji lived, but here in this professional gathering let us not forget that Gandhiji was a Barrister-at-Law and in a sense it was the legal profession which proved the turning point in his life. Had he not been a lawyer he would never have been taken out to South Africa and the edifice of that wonderful life of which the foundations were laid in South Africa might never have been erected or might have been erected in a different way altogether. He was for many years an active member of the profession and he had built for himself in South Africa a very lucrative practice. Had he continued in it he might have amassed a fortune. But it was God's purpose that he should work in another sphere altogether to fulfil a far mightier purpose and therefore he forsook the profession and betook himself to other paths leading to the noblest service of suffering humanity and of his people subject to alien rule. Let us, however, remember always that, as his own narrative in his Autobiography establishes beyond question, the pursuit of truth and the observance of the highest standards of morality and ethics are in no way inconsistent with the practice of the profession and achievement of material success in it. On the contrary, these are the passports not only to material advancement but also to positions of highest respect and reverence among one's fellow citizens. I devoutly wish that every beginner in the profession would take to heart and keep before him as an infallible guide the example of Gandhiji and follow the methods by which Gandhiji attained such wonderful popularity with the litigant public while he was at the Bar. Gandhiji has definitely shown that the composing of family differences, the settlement of disputes

and controversies by amicable compromise is and should be one of the first duties of a member of the legal profession, and how mistaken is the popular notion that lawyers foment dissensions for their own ends.

You are meeting for the first time in an independent India. The people of Utkal share that immeasurable good fortune along with their countrymen throughout India. But you as members of the legal profession in Orissa are doubly fortunate in that you will soon be witnessing the fulfilment of one of your most cherished ambitions. Ever since the Province was constituted, the Orissa Bar has longed for a High Court in Orissa. This was a perfectly understandable ambition. A High Court does not merely lend dignity and status to the Province. It is in reality a vital organ in the provincial body politic. But apart from that wider aspect, a High Court is essential for the development of a competent and independent Bar in the Province. A High Court inspires respect and confidence in the people of the Province in the administration of justice. In its existence among their midst, people feel a sense of security. It is rightly considered a bulwark of freedom and a shield against injustice and tyranny and oppression. And along with the High Court, the Bar which assists the Judges from day to day in the administration of beneficent justice shares the glory, the dignity and the prestige of the Court. It is indeed a matter for great rejoicing that Orissa shall soon have a High Court of its own which will begin to function in all likelihood from July next. In making the foregoing observations I do not even remotely imply even the slightest or the remotest reflection on the Circuit system which has prevailed so far in Orissa. On the other hand, we are very grateful indeed to the Hon'ble Judges of the Patna High Court for the way in which they have administered equal justice among the inhabitants of Orissa. The Patna High Court has preserved and continued undiminished the very great traditions of the Calcutta High Court, and in the Patna High Court I am sure the people have found a dispensation of justice without fear or favour, affection or ill-will. But our own High Court shall, like the Temple of Jagannath, be dearer to us and more sacred to us than the Temples of Justice elsewhere. I hope and pray that this Temple of Justice will tend to the moral and material advancement of the people because those people only can prosper who live with security under the protection of equal laws justly and impartially administered near their homes by Judges who work with the fear of God but without the fear of man.

I may say at once that the Circuit system, howsoever efficient it may have been in the beginning, has really broken down. Judicial business has been growing in volume, and I imagine in complexity too, with the result that arrears have been accumulating enormously. We definitely require a larger number of Judges and with the increase in the size of the Province by the accession the States, the case for a separate High Court with at least five Judges was absolutely unanswerable. I trust that with this number justice will be administered not only efficiently but also with speed. It is a trite saying that justice delayed is justice denied. I do hope that in the new High Court it may be found possible to dispose of all criminal appeals and revisions within a few months and that no civil case of any kind, be it a First Appeal or a Second Appeal or a mere Miscellaneous Proceeding, will remain pending for more than twelve months. Fortunately our High Court will begin to function in a free India under the most favourable conditions, and I trust that with the assistance of the Bar it may be found possible to frame the Rules of the Court relating particularly to the preparation of records in such a way that very considerable expense in translations and printing might be saved, and cases might become ready for hearing within a comparatively short time. In the preparation of these records the fact that English has been the language of the Court has played a most important part. It will be for you to consider how far in the present set up the old practice might be relaxed so as to save expense and trouble to litigant parties. This brings me to another aspect of the situation.

The great Anglo-Indian Codes, Laws and Regulations have played a great part in the unification of India during the last 150 years. Not only were these of universal application throughout that part of India which was directly under British Administration, but practically every single Indian State had adopted them as enforceable law within its own territory. And in the interpretation and administration of these laws there was general uniformity throughout British India and the Indian States as a result of the devoted labours of the various Indian High Courts guided by the Judicial Committee of the Privy Council. This was a signal achievement of the greatest value, and we must preserve it in our independent India at all costs. Towards this achievement the fact that only the English language was the language of the Court throughout India has played a great part. Not only in British India but even in the Indian States English was generally in vogue

as the language of the Court of Final Appeal in the State territory.

With the advent of independence naturally the question of a national language has assumed the greatest importance. On the one hand it is generally recognised that national interest demands a common national language. A national language is indeed the *sine qua non* of a free united India. On the other hand, one cannot ignore the strong attachment to the different regional languages in various parts of India. In every Province and State there is already a demand that the regional language should become the language of the Legislature, of the Courts and of administrative offices. That demand may well prove irresistible unless public opinion is properly persuaded to weigh carefully the different aspects of this most important problem. We shall have a Final Court of Appeal, be it called a Federal Court or a Supreme Court, for the whole of India. We all anticipate that it will be a strong Court, strongly manned, and it will be assisted by a strong Bar attached to that Court. Obviously the national language of India shall be the language of that Federal or Supreme Court. You cannot have a babel of voices in the Federal Court. All judgments and decrees and orders from that Court shall issue in the national language, and I trust that these judgments will continue to be enshrined in various official and non-official law reports.

An ideal thing to foster uniformity in the interpretation of all-India laws would be to provide by legislation that the judgments in each High Court throughout the Federation or Union of India shall be delivered in the common national language. Arguments and proceedings may or may not be conducted in the national language. These may even be permitted in the regional languages in vogue in that Unit, but rules should require complete proficiency on the part of the Bench and the Bar in the national language so that judgments may be composed and delivered in that language. Unless this end is achieved by proper rules, the results may well be disastrous. Not only shall we run the danger of losing our unity and uniformity in the administration of justice but it might deal a death-blow to the solidarity of the Bar. At present we have in substance an all-India Bar. An Advocate has right of audience in every Court throughout India. But if in the different High Courts like the Subordinate Courts proceedings

are conducted in different regional languages, this cherished right would become an empty phrase. It would be so difficult to exercise it.

This question of language is a matter of vital importance. It has been suggested that we should hasten slowly, and that for some years in this period of transition the use of English might well be permitted to continue. This suggestion is no doubt partly prompted by the fact that the present generation is accustomed to the use of English and both the Bench and the Bar may find some difficulty in attuning themselves to the changed order of things. But even if that were allowed, it would not solve the difficulty. It might only postpone the decision for a few years. The problem will have to be tackled either to-day or in the very near future, and I suggest that so far as the Final Courts of Appeal in every Unit of the Federation are concerned, we should insist in the highest public interest, in the interest of uniformity of administration of justice and the interpretation of the laws of the land, that judgments should be delivered in the national language and I would even go further and plead that arguments should also be conducted or at least permitted in the national language. This I plead not only in the interest of the creation and the solidarity of an all-India Bar but also in the interests of the efficiency of the different High Courts too.

In the new set-up the old High Courts with which you and I have been so far familiar will have undergone a complete change. There will be no longer any Barrister Judges in our Courts imported from England, nor would there be any British I. C. S. officers elevated to the Bench from the districts. Between them they counted often for more than half of the Judges on the Bench. This was of course directly due to the alien Rule over India, but it had a redeeming feature in that there were always a number of Judges in every High Court completely free from local attachments and embarrassments of every kind. Most of us strongly advocate direct recruitment of Judges to the High Court straight from the Bar. The reasons for this view lie on the surface and I need not enlarge upon them. But at the same time we must bear in mind that we in India, outside the two towns of Calcutta and Bombay, take instructions directly from the client, with the result that the relationship between Counsel and client in India is far more intimate than it is in England. In smaller provinces a leader of the Bar may become well acquainted with almost every leading family in the Province, and he may on

the Bench sometimes feel some embarrassment in the discharge of his duties. Again, the circle of family relationship in India is much wider than in the west and not infrequently leading Advocates have sons and nephews and other relations practising with them or independently in the same Court. Bearing all these factors in mind, I have always been of the opinion that it would be a very good thing indeed if we had a system of inter-provincial appointments to our High Courts. This can be brought about without much difficulty, because the Draft Constitution proposes that appointments to the High Court Bench shall be made by the President of the Federation and the President may well see to it that in every High Court a substantial number of Judges are appointed from outside the Province. There must not of course be what I may call one way traffic in the appointment of Judges. Members of each Provincial Bar should be entitled as of right to claim to serve on the Bench. Indeed a Judgeship may often be the highest form of public service that a citizen may render to his country. We should have a convention, as there is one in England, that no Member of the Bar, no matter how highly placed he may be in the profession, is at liberty to refuse a Judgeship when it is offered to him, and therefore it is but fair that for the number of Judges recruited for every High Court from outside, an equal number of leading Members of the Bar in that Province should be given an opportunity of serving in the other High Courts. I have no doubt in my mind that these inter-provincial appointments would be a great blessing. They would ensure the existence of an element on the Bench with complete detachment to local environment. The office of a Judge necessarily entails some aloofness, some dignified isolation, and I am sure—and I speak from personal knowledge—that Judges who come from other provinces will find in their new sphere of public service peace of mind and absence of all embarrassment which may not be always available to them in their own home province. I do not by any means rule out every appointment from the local Bar to the local High Court. I am contending only for a proportion at least of such appointments to go to Advocates hailing from other provinces. This scheme, however, necessitates that the language of each High Court should be the common national language. Otherwise the scheme will not work at all. It would be difficult for instance to secure a Judge from outside for Tamilnad and having such complete mastery over Tamil as to be able to take part in the arguments in Tamil and deliver judgments

will soon develop in our superior Law Courts, the High Court in the Province and the Federal Court at the Centre. Generations of Indian lawyers have looked upon with the devotion of a worshipper looking upon his deity in the Temple, devotion almost amounting to awe, on the text-books of English Law and of myriads of precedents in the English Law Reports. Consciously or unconsciously for the last 150 years we have imbibed notions of English jurisprudence. The Judicial Committee of the Privy Council has been the arbiter of our judicial destinies, and all our legislation has been mostly modelled upon English Law and Statutes. The Judicial Committee has no doubt warned Indian Judges against following too slavishly the English precedents. Over and over again it has been said that the English Law of Real Property has its origin in local conditions which have never existed in India. But these warnings have often failed and we have frequently succumbed to the charm of English legal text-books and Case Law. I hope all this will now be changed. The Indian legal genius will for the first time have the opportunity to blossom and flower unaided in its own atmosphere. I do hope that Indian lawyers will turn with respect and reverence to their own ancient sources. It is generally not realised that we possess a system of jurisprudence complete in itself and as just and fair between man and man as any other system in any part of the world. It is true that because our British Rulers decided to enforce the personal law of the Hindu and the Muslim only in regard to particular matters, those branches of the law are more familiar to us. But if anybody imagines that the Hindu Law only consists of what was enforced in the Anglo-Indian Courts and there was nothing else, he is sadly mistaken.

The establishment of a High Court in Utkal will of necessity lead to the creation of strong High Court Bar in the Province. The Circuit Court was not conducive to that achievement. I trust that the High Court Bar will attract competent seniors as well as many industrious young men from the various districts of Orissa, both old and new. I fear people do not realise how imperative is the need for a strong independent and talented Bar for the proper administration of justice. In a sense the Indian Bar as we see it to-day is a gift of the British Rulers of India. They sought to reproduce the system of administration of justice as well as the institutions with which they were familiar in their own country. And in England, the Bench and Bar are the two facets of an indivisible picture. The lawyers of India have played a momentous

part in the great struggle for freedom. Not only were they in the forefront of national movement when Congress was wedded to constitutionalism, but when it took, under the leadership and inspiration of Gandhiji to non-violent non co-operation and direct action, even then the lawyers of India held the flag high. What great names leap to the mind when one thinks of the lawyers of India, the great Advocates in the great cause of freedom, Pandit Motilal Nehru and Chittaranjan Das, Pandit Madan Mohan Malaviya, the great Lala Lajpat Rai and a host of others in every province. And now that India is free, lawyers are at the helm of affairs.

Pandit Jawaharlal Nehru and Sardar Vallabhbhai Patel and Dr. Rajendra Prasad and Sri Rajagopalachari—what a galaxy of talents—all started life in the legal profession. It will, however, be a fatal mistake to suppose that now that independence has been achieved, and the immediate task of the moment is the reconstruction of India and development of its material resources, the lawyers of India have to play a comparatively unimportant part in our national economy. Please remember that while material advancement and economic prosperity are good things, freedom, freedom from fear, personal liberty and freedom of speech and of association is the very breath of national life. Without freedom everything else is dust and ashes, and it is the priceless privilege of lawyers to assist the citizen in ensuring and pursuing and enjoying freedom in all its aspects. The noble dictum that eternal vigilance is the price of liberty is true not only when liberty has been lost and has to be regained, it is still more true when liberty has been achieved and we have to guard it not only from external aggression but also from the new despotism of bureaucracies, and the high-handedness of arbitrary executives. The Courts are the bulwarks of freedom and the Bench and the Bar are the twins which sustain the fabric of these mighty bulwarks. Advocates have to discharge their duties fearlessly—fearless of the frowns of those in executive authority or even the frowns of Judges. I know of no nobler assertion from the Bar than that made by the great Erskin when he said to the Judge, "My Lord, I am here appearing as an Advocate for a brother citizen. I know my duty, and I shall do it. Your Lordship may do your duty as you like." That is the spirit which I pray may sustain the lawyers of Orissa to-day and for generations to come.

As an old hand in the profession, I am often asked by young friends about the secret of success and my answer is always short

and direct. This profession requires a certain definite aptitude and a certain mental apparatus. If you find that God Almighty has not equipped you with that aptitude and that apparatus, then I suggest that the sooner you bid the profession good-bye, the better it will be for all concerned. But if you find that you possess these prerequisites, then the only secret that I know of is that you should always, invariably and every time, set the interest of the client above your personal interest, no matter what the temptation may be, and whatever may befall. In the discharge of your duties in an honourable decent way, his interest should come first, always and every time, and your own interest last, always, and every time. Every client, no matter who he may be, be he an industrial magnate or a large landed proprietor or a simple illiterate cultivator of the soil, quickly as if by instinct seizes up his legal adviser so far as this particular attribute is concerned, and if he is satisfied that in his pleader he has got a selfless dependable friend, then you may take it from me that your success, even though your intellect may not be very brilliant, is assured.

Vast responsibilities now rest upon the legal profession in the various fields of constructive endeavour, particularly in the sphere of legislation and judicial procedure in the Law Courts. The great Codes of Civil and Criminal Procedure are really remarkable and are imbued with a single-minded desire to promote justice between man and man, but the criticism is valid that the procedure enjoined is complex and is unsuitable to the local conditions in India and our ancient institutions. In England for centuries there was a well directed tendency for centralisation of administration of justice. After all England was a very small country and up to the year 1800 its population was something like the present population of Orissa (the States combined). We in India on the other hand have always favoured decentralisation. The great village communities throughout the land administered justice expeditiously and on the spot in their own villages, and I have no doubt that this method suppressed perjuries and forgeries. The village panchayat sitting in the village in the presence of the village community as a whole not only inspired confidence and trust but also inspired terror in the mind of the evil-doer and his false witnesses. The British Rulers centralised the administration of justice and in doing so practically killed our village institutions. They enacted great procedural codes, but centralised judicial administration miles away from the scene of occurrence or the homes of the private litigants encouraged false cases and baseless

harassing litigation. These centralised courts, completely bereft of the wholesome influence of local public opinion seem, like indoor wards of a General Hospital, to be the haunts of dishonest parties and lying witnesses. India is still continuing to live in its villages and therefore the whole judicial system has to be modified and simplified so that it may serve its real end, viz., the pure administration of justice. I trust that you will welcome the trend which is now visible throughout India towards the vitalising of our village communities and making them self governing even in the sphere of administration of justice in petty cases. I am free to confess my great admiration and reverence for the institution of trial by jury. I know that many members of the Bar do not share my views, but I consider that this institution is a necessary concomitant of democratic institution and representative governments. After all what does democracy consist in? It means the government of the people by the people for the people. It means that the people must be associated most intimately with the task of governing themselves and they must bear the responsibilities not only of executive government but also of the administration of justice. I know that it is idle to expect that false testimony from a court of law can ever be eliminated, but the surest way to eliminate it in so far as it is humanly possible to do so is making public opinion detest the false witness, and this general detestation can only be created by throwing the burden of deciding simple questions of fact, both in criminal as well as civil litigation, on juries and panchayats.

I sometimes think that in our pursuit for probabilities we overlook the vital importance of direct testimony by witnesses. There are two ways of dealing with direct testimony: one is to concentrate on what the witness has stated and to consider whether there is any sufficient reason to discard that testimony on the ground of partiality or unreliability of the witness. The other is to test the evidence in the light of the so called probabilities of the case. After 40 years' experience at the Bar I have come to the conclusion that the second method is the most dangerous and is really often the cause of the conflicting decisions from Court to Court on a particular issue of fact. Probabilities of a case mean really nothing more than the reconstruction of the case by a particular individual in accordance with his own notions of what must have happened, and such a reconstruction may differ from individual to individual according to his preconceived notions of the working of human nature and his own personal idiosyncrasies.

Commonsense, supposed to be common, is a rare endowment indeed. Probabilities of the case are, therefore, nothing but speculations while direct evidence, if believed, is a sure and certain path in the search for truth. It does not require much book learning to enable anyone to determine for himself whether a particular witness before him is telling the truth or not, and if the tribunal, like a jury, consists of many persons, in my opinion the chances of its reaching the truth are bright indeed. I would personally, therefore, strongly favour constitution of strong trial Courts aided by Juries and then a drastic curtailment in the right to a series of appeals from Court to Court.

I am fully aware that my partiality for what may be called judicial panchayats in the rural areas is not shared by many members of the Bar. I would have gladly bowed to their opinion in this matter, but I have an innate feeling that in a free India, only if we were true to ourselves and educate our masters well, we would find these panchayats efficient instruments for administration of justice cheaply, expeditiously and satisfactorily. Speaking quite frankly, talks about a variety of legal reforms leave me rather cold. The most urgent reform in my opinion is the necessity of diminishing the evils which flow in this country from perjury. It is almost a super-human task for a Judge to arrive at the truth through the masses of falsehood, and, with all due diffidence, I think the present centralised system of administration of justice cannot cure this evil. It can only be cured by rousing public opinion against it, and that can only be done in my opinion by decentralizing the administration of justice, and, so far as village disputes are concerned, by throwing the burden of settling these disputes on to the people themselves. Then and then only you will impose some sort of an effective check upon perjury. False witnesses will not dare to tell lies in front of their own brothers and sisters in the village. In bygone days Indians were noted for their truthfulness and all travellers from abroad have noticed with wonder and admiration this trait of Indian character. Disregard of truth and readiness to tell lies in a court of law is one of the results of foreign domination which is destructive of national character. The administration of justice, not being the concern of the people themselves but an imposition of alien authority, to cheat the law and the Judge by telling skilful lies is supposed to be as free from blame, if not even meritorious, as it is to cheat the customs. I feel that in a free India when people realise that to administer justice in village affairs is their own sole concern and not somebody else's

from outside; both public as well as individual conscience will be awakened and the stream of justice will flow limpid and free from most of its present impurities.

All this applies, with equal force, to the institution of trial by jury. There is everywhere a perfectly reasonable demand for the separation of judicial and executive functions. That separation will, I hope, be effected in a very short time, but can you conceive of any tribunal more fearless, more independent, more impartial than that of a jury? A jury is selected for a particular case and then, after the trial is over, disperses, the jurors having nothing to fear and nothing to expect if they decide the case one way or the other. To protect a citizen against official tyranny and oppression, I know of no higher tribunal on the face of the earth than a good honest god-fearing jury. It is not for nothing that in England and U. S. A. the right of trial by jury is sacrosanct and is prized and cherished as the greatest safeguard for the life and liberty of the individual citizen.

I imagine many topics concerning the welfare of the Bar and the organisation of the legal profession will engage your attention. You will, when you consider these matters, no doubt give full effect to the changes brought about by the bloodless revolution in India. Most of the slogans of ancient days have now lost all their meaning. When people found, as I found in my earlier days, junior I. C. S. Magistrates functioning as District and Sessions Judges with very hazy notions of civil law, there was great substance in the demand that appointments to the judicial services should be made from the Bar, but now the entire judiciary—and in the word judiciary I include your Munsiffs and Magistrates, Civil Judges and Sessions Judges—will be recruited from amongst persons legally well qualified. The problem is a fairly complex one. A competent judiciary and an equally competent and experienced Bar must go together hand in hand and inside the judicial service a system must be devised by which the fullest incentive is afforded to industry and merit. It is commonly supposed that experience coupled with merit is a qualification for preferment, and habits of judicial aloofness and detachment which a judicial officer acquires from the very beginning in his service should be, if anything, valuable and fit him for discharging more onerous judicial responsibilities. You will also consider whether practice at the Bar for a minimum number of years should or should not be a prerequisite to appointments as Munsiffs and Magistrates. We all fully realise that there should not be any rivalry

or unhealthy competition about these matters between the Bench and the Bar. They both form an indivisible whole to run the judicial machinery smoothly, and therefore I would beg of you in this Conference to come to your conclusions, keeping in view the welfare of the legal profession as a whole, of which both Bench and Bar are component parts.

No one will deny that lawyers do not cease to be citizens. If anything, they become better qualified to exercise the right of citizenship and as lawyers they should play their full and effective part in shaping the course of legislation. You should influence policies as well as the framing of legislative enactments. We all know the grave difficulties which arise in the law courts out of hasty, ill-considered and loosely-worded legislation. It would be most desirable if the Central Bar Association, aided by the District Bar Association, were to appoint standing committees whose function it would be to closely scrutinize all Bills brought before Legislative Assemblies and to submit comments thereupon before they are finally enacted by the Legislature. It is not what the Legislature intends, but it is what it is able to express adequately in words that really counts, and it is in that direction that the lawyers can be of invaluable aid to all legislators, to help them in expressing their intentions in accurate and precise language.

Complaints are not seldom made that the system of legal education in vogue in India requires considerable examination and modification. This examination will have become much more necessary now that the almost crushing burden of English law will have been lifted from our jurisprudence. I do not intend to decry the merits of western jurisprudence, but then we should not limit ourselves to one particular source. We should endeavour to irrigate our fields from all streams that flow in the valley. The Indian law student should study not only the English law but the jurisprudence of his own country as well as of other countries in the world.

I shall now end these desultory observations by thanking you once again for your kindness and courtesy and by offering my best wishes for the success of your labours. I hope your deliberations and resolutions will promote the administration of justice as well as the welfare of the legal profession in Orissa.

Notes of Cases.

Soonderdas Thakarsay v. Bai Laxmibai.

1944.

[1945] Bom. 1047.

Indian Limitation Act (IX of 1908), section 10—Trust for a specific purpose—Shares declared by Court to belong to others but standing in the name of one person—Such person, if an express trustee for the others.

Soonderdas Thakarsay and others had a partnership business with one Raghavji Khimji in whose name stood the shares belonging to the firm. After a decree for dissolution of firm was passed in 1931 Raghavji made over to Soonderdas and others the share certificates which continued to remain in his name. On his death, Bai Laxmibai the executrix of his Will filed a petition for probate and in the schedule thereto included the said shares and the unrecovered dividend warrants standing in his name. In the declaratory suit by Soonderdas against the defendants for transfer of shares, dividend warrant etc.

Held [per Chagla J.]—that under the decree of February 6, 1931, no trust for a specific purpose was created and Raghavji Khimji was not an express trustee i.e. for a specific purpose and section 10 of the Limitation Act did not apply to the case.

S. C.

The Municipal Borough of Ahmedabad v. Mulchand Nanchand.

1945.

[1945] Bom. 1084.

Defence of India Rules 1939 rule 38B subrules (1) and (2)—Municipality superseded by notification—Suit by administrator—Provincial government, if necessary party.

The suit for damages filed against Mulchand, a contractor, by the Municipal Board of Ahmedabad which was superseded under the Defence of India Rules 1939 by the Government of Bombay was sought to be continued by the Administrator thereof. The objection that the Government of Bombay should be made a party was upheld. In revision:

Held [per Lokur and Weston J.J.]—that where a municipality is superseded under rule 38B of the Defence of India Rules 1939, the provincial government is not a necessary party to a suit filed or continued by the Administrator thereof.

S. C.

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NOTES OF CASES.

Blows v. Chapman.

[King's Bench Division (Lord Goddard C. J., Humphreys
and Singleton J.J.) October 17, 1947].

*Street and Aerial Traffic—Motor Vehicle—Farm labourer driving
uninsured tractor—"Special reasons" for refraining from dis-
qualification for holding license—Road Traffic Act 1930 (c. 43)
section 35 (2).*

1947.
[1947] 2 All. E. R.
(K. B. D.) 576.

Chapman a farm worker and driver of tractors was asked by his employer to drive a tractor, which he did not know to be uninsured, for 100 yards along a public road for carting manures and was convicted on an information by Blows, an inspector of police, and disqualified for holding driving license for one year. On appeal the order was set aside. On appeal to Bench:

Held: that were special reasons within section 35(2) of the Act for refraining from disqualifying the labourer for holding or obtaining a driving license under Part I of the Act.

S. C.

H. Morell & Sons Ltd. v. Canter.

[Court of Appeal (Scott, Asquith and Evershed L. J.J.),
October 14, 1947].

*Landlord and tenant—Business carried on in two separate premises—
Apportionment of goodwill—Landlord and Tenant Act 1927
Ch. 36) sections 4, 5.*

1947.
[1947] 2 All. E. R.
(C. A.) 533.

The tenants H. Morell & Sons Ltd. carried on business in two adjoining buildings under different landlords. One building was solely used as a warehouse and the other as shop and workshop. On the termination of the lease the tenants served a notice on the landlords under the Landlord and Tenant Act 1927

requiring him to grant them a new lease of the warehouse as part of the goodwill of the business was attached to the warehouse. The County Court Judge held that no goodwill attached to the warehouse. On appeal:

Held: there was nothing in the Act to warrant the assertion that where a business was carried on in two separate buildings and goodwill attached to the business there must in law be apportionment of the goodwill between the two and therefore as no goodwill attached to the warehouse as such, no order under section 5 of the Act for the grant of a new lease of the warehouse could be made.

S. C.

V. Chidambaram Chettiar v. M. H. Meyyappan Ambalam.

1945.
I. L. R. [1946]
Mad. 672.

Indian Stamp Act (II of 1899), section 34—Scope of—Original document lost or destroyed without being properly stamped—Copy not admissible even on payment of penalty.

The point for decision in this case was whether a copy of a document which is required to be stamped under the Indian Stamp Act but which is lost or destroyed without being properly stamped, is admissible in evidence even on payment of penalty:

Held [per *Leach, C. J.* and *Koman, J.*—that if a document which requires to be stamped under the Indian Stamp Act is lost or destroyed without being properly stamped, a copy thereof is not admissible in evidence even on payment of penalty and that section 34 of the Act relates only to stamping of original documents.

Rippiner v. Wright, Clerk (1) applied.

Raja of Bobbili v. Inuganti Sitarumasami Garu (2) referred to.

S. C.

(1) (1819) 2 B & Ald 478; 106 E. R. 440.

(2) (1899) I. L. R. 23 Mad. 49 (P. C.).

Srimatti Tirumala Venkata Srinivasacharyulu Ayyavarlam Garu v. Srimath Kidambi Srinivasa Venkatavaradacharyulu.

1945.
I. L. R. [1946]
Mad. 720.

Code of Civil Procedure (Act V of 1908), section 47—Scope.

The respondent acquired the mortgagors' rights in one of the items of the mortgaged property and later on obtained assignment of the mortgage decree and executed it for the full amount.

Held [per *Horwill and Bell, JJ.*—that there was no *pro tanto* and automatic discharge of the decree and the respondent could execute it for the full amount, that the appellant cannot raise such objection in the execution proceedings as it did not relate to “execution, discharge or satisfaction of the decree” within section 47 of the Code and that the only remedy of the respondent was to file a suit for contribution.

Cases of different High Courts on this point discussed.

S. C.

Ummiulnissa v. Fatima Begam.

Mahomedan Law—Pre-emption—Whether only one demand necessary under the Shia Law.

1945.

I. L. R. [1946]
All. 491.

In a suit for pre-emption the plaintiff alleged that she made two demands, one immediately on hearing of the sale and the other in the presence of witnesses at the house and in the presence of the vendee. It was found that talab-i-ishhad was made according to law but no reference was then made to talab-i-mousibat. On the question whether one demand was sufficient under the Shia Law:

Held [per *Verma and Mathur, JJ.*—that there is no justification for the view that the Shia law of pre-emption requires only one demand and it is well settled that when the talab-i-ishhad is made, a reference to talab-i-mousibat is absolutely necessary.

S. C.

Kadir Bibi v. M. V. Mallappa Pillai.

Transfer of Property Act (IV of 1882), section 60—Clog on redemption.

1946.

I. L. R. [1946]
Mad. 739 F. B.

In a deed of usufructuary mortgage dated 30th January, 1929, the date of redemption was 3 years and 3 months after the date of execution and it fell within the fallow period of the year and in default redemption was allowed on payment on 30th Panguini (15th April) of any succeeding year. On reference to Full Bench:

Held [per *Leach, C. J., Lakshmana Rao and Happeil, JJ.*—that section 60 of the Transfer of Property Act gives the mortgagor right to redeem any time after the principal amount becomes due, that this section does not invalidate any provision of the deed,

that the mortgagee was entitled to reasonable notice before payment or tender of mortgage money, that by providing that redemption be made only on the 30th Panguini the parties themselves decided what was reasonable notice, that the provision that redemption be allowed not during cultivation season but during the fallow season was reasonable and that the provision for redemption by payment on 30th Panguini did not amount to a clog on equity of redemption.

Suppan Chettiar v. Rangan Chetty (1) overruled.

Govinda Menon v. Chathu Menon (2) referred to.

S. C.

(1) A. I. R. (1938) Mad. 405.

(2) A. I. R. (1914) Mad. 563.

In re a Pleader, Gudivada.

1946.

I. L. R. [1947]
Mad. 1 F. B.

Legal Practitioner—Drafting of affidavit with allegations of fraud or bribery under instructions of client, if misconduct.

The complainant, a pleader commissioner, asked by Court, delivered possession of land to the decree-holder auction-purchaser, a client of the respondent, a pleader and got the receipt acknowledging delivery of possession from him. Three days later, an affidavit drafted under instruction of the auction-purchaser was filed by the respondent alleging that the complainant, bribed by the opposite party, made a false report which was found to be false.

Held [per *Lesch, C. J., Lakshmana Rao and Happell, JJ.*]—that the respondent as a pleader drafting an affidavit for his client was justified in drafting and filing the affidavit and was not required to verify whether the statements made by him are absolutely true but only to be satisfied that there were reasonable grounds for believing them to be true.

S. C.